Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-854

PROVIDENCE HOSPITAL,
Petitioner,

versus

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS-MORSE, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIS C. DARBY, JR.
Post Office Box 2565
Mobile, Alabama 36601
Counsel for Petitioner

December 12, 1977

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Providence Hospital (Providence), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on May 9, 1977 and on rehearing on September 14, 1977.

OPINION BELOW

The opinion of the Court of Appeals reported at 551 F.2d 1026, appears in the Appendix hereto, *infra*, page

9a; the opinion of the Court of Appeals on rehearing, reported at 559 F.2d 268, appears in the Appendix hereto, *infra*, page 31a. The opinion of the District Court reported at 387 F.Supp. 1001, appears in the Appendix hereto, *infra*, page 34a.

JURISDICTION

The opinion of the Court of Appeals was entered on May 9, 1977. A timely petition for rehearing was granted in part on September 14, 1977; and this petition for certiorari was filed within ninety (90) days of September 14, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C. §1332.

QUESTIONS PRESENTED

1. Does a defendant forfeit benefits of a contractual dispute settlement procedure requiring arbitration as a prior condition to suit by moving to dismiss a contract claim, never presented to arbitration, for failure to state a claim upon which relief can be granted?

2. Are courts bound by contractual provisions specifying time limitations on filing and appealing claims and restricting remedies where a party to the contract waives the forum of arbitration?

3. Is the construction by a district court of a purported "no damage" clause in a construction contract entitled to deference unless clearly erroneous under Rule 52(a) F.R.Civ.P.?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 9, "Arbitration" §§2, 3, and 4, appear in the Appendix hereto, *infra*, pages 6a and 8a.

STATEMENT OF THE CASE

On July 29, 1968, Providence and Manhattan Construction Company of Texas (Manhattan) entered into a construction contract for additions and modifications to hospital facilities of Providence (Finding 2, App. 36a).[1] The construction was aided by a $1,000,000 Hill-Burton federal grant (Finding 2, App. 36a). The contract incorporated "General Conditions" developed by the United States Public Health Service and approved by the United States Budget Bureau for use on federally assisted hospital projects (App. 1a, A. 441).

The General Conditions provided:

1. a two step procedure for settlement of all claims of the Owner or Contractor arising in connection with the contract by submission to the architect for a written decision, with the right to appeal to arbitration pursuant to the standard Form of Arbitration Procedure of the American Institute of Architects (App. 1a-2a);

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1 Citations to "Finding" and "Conclusion" are to the opinion of the District Court; citations to "Decision" are to the opinion of the Court of Appeals; citations to "Opinion on reh." are to the opinion of the Court of Appeals on rehearing; citations to "App." are to the Appendix hereto; citations to "A." are to the printed Appendix in the Court of Appeals.

2. "if the Architect fails to make a written decision . . . within ten days after written request for same . . . either party may then demand arbitration" (App. 2a);

3. "any demand for arbitration shall be made within thirty days after the dispute has arisen if practicable" (App. 3a);

4. "the decision of the arbitrators shall be a prior condition to any right of legal action" (App. 2a); and,

5. a remedy of an extension of time for completion of the contract occasioned by delays caused by the Owner (App. 5a-6a).

In the course of the project Manhattan, pursuant to paragraph 31(c) of the General Conditions, requested extensions of time from the Architect; some were allowed, some denied (Finding 4, App. 37a; Finding 16, App. 42a). In November, 1968, a dispute arose over the sewage ejection system. "Manhattan requested an extension on its contract . . . because of this delay, but its request was denied by the Architect" (Finding 24, App. 44a). In January, 1969, a dispute arose over Palco bed light fixtures (Finding 47, App. 49a); "Manhattan requested a 59 day extension . . ."; no extension was granted (Finding 49, App. 49a).

E. C. Ernst, Inc. (Ernst), Manhattan's electrical subcontractor, commenced this action on October 28, 1970, against Manhattan, Providence, Fairbanks-Morse, Inc. (Fairbanks), an Ernst supplier, and Charles H. McCauley Associates, Inc. (McCauley), the architect;

Ernst sought damages, declaratory and injunctive relief concerning the emergency generator (A. 1-48). On November 27, 1970, Manhattan answered, claiming damages from Ernst, McCauley, Providence and Fairbanks for delays associated with the emergency generator[2] (A. 49-54).

On December 16, 1970, Providence moved (1) to dismiss the complaint of Ernst against Providence for failure to state a claim, (2) to dismiss the claims of Manhattan against Providence for failure to state a claim, and (3) "to stay further proceedings . . . because this cause will not be ready for judicial determination until such time as Manhattan has performed its obligations under the construction contract with Providence" (A. 54-79).

On December 17, 1970, in the BRIEF IN SUPPORT OF THE MOTIONS OF PROVIDENCE HOSPITAL TO DISMISS AND TO STAY, Providence raised the dispute settlement procedure of the General Conditions in support of Providence's motion to dismiss and stay Manhattan's cross-claim against Providence (Decision, App. 26a). Argument in the BRIEF IN SUPPORT OF THE MOTIONS OF PROVIDENCE HOSPITAL TO DISMISS AND TO STAY concerning Manhattan is reproduced in the Appendix hereto, page 70a, *infra*. Providence argued that the General Conditions provided for arbitration of disputes between Providence and Manhattan such as the emergency generator system dispute, that Manhattan's damages

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2 The original complaint of Ernst and the initial cross-claim of Manhattan referred only to the "emergency generator system"; neither mentioned the sewage ejection system, the Palco lights, or any other alleged cause of delay (A. 1-54).

(if any) could have been mitigated or avoided by prompt demand for arbitration, and that the cross-claim should be dismissed because the General Conditions provided a complete and reasonable means to resolve such disputes, which " 'must be exhausted before relief is sought in the courts' ", quoting *United States v. Blair*, 321 U.S. 730, 736. Providence cited *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 240 to the effect that, if a contractor fails to exhaust his contractual dispute settlement procedures, the " 'court is then obligated to outlaw his claims, whatever may be their equity. To do otherwise is to rewrite the contract.' " Providence also raised Paragraph 31(c) of the General Conditions, which provided for equitable adjustment for "delays in the completion of the work due to . . . acts of the Owner" in that "the Architect . . . shall ascertain . . . the extent of the delay and extend the time for completing the work" and argued that the contractual provision for extension of time on account of delays by the owner precluded any right of the contractor to collect damages for such delays, under *United States v. Rice*, 317 U.S. 61.

On December 22, 1970, the District Court granted Providence's December 16, 1970, motion to dismiss the complaint of Ernst as to Providence (A. Docket Entries, p. 2). On January 11, 1971, Manhattan filed its FIRST AMENDED ANSWER AND CROSS-CLAIM; on January 13, 1971, Providence moved to dismiss the cross-claim of Manhattan against Providence, as amended January 11, 1971, for failure to state a claim (A. 90-91).

On January 15, 1971, the District Court held the Providence motion to stay of December 16, 1970, moot (A. Docket Entries, p. 2).

On January 27, 1971, Manhattan filed its SECOND AMENDED ANSWER AND CROSS-CLAIM which again amended the cross-claim against Providence, set forth the arbitration provision of the General Conditions and alleged (incorrectly) that Manhattan had demanded arbitration of the decision of the architect not to accept the proposed emergency generator and damages for delay, and further alleged (incorrectly) that "Providence and McCauley refused to arbitrate" (A. 94-98). In fact, no demand for arbitration was ever filed (Decision, App. 26a, n. 38).

On February 4, 1971, after 5 days of testimony presented by Ernst and Fairbanks on the sufficiency of the emergency generator, the District Court held that the Fairbank's emergency generator failed to "meet the requirements of the specifications." (Finding 5, App. 37a).

Manhattan amended its cross-claim against Providence on May 17, 1971 (A. 106-09), July 30, 1971 (A. 113-33) and April 13, 1973 (A. 280-309). None of the claims of Manhattan concerned the sewage ejection problem (Finding 11, App. 40a-41a).

On October 22, 1971, Providence moved to dismiss the claims of Manhattan against Providence, filed on July 30, 1971, for failure to state a claim (A. 150).

On February 23, 1972, the District Court held Providence's January 13, 1971, motion to dismiss claims of Manhattan moot (A. Docket Entries, p. 6). On May 30, 1972, the District Court denied Providence's October 22, 1971, motion to dismiss the July 30, 1971, claims of Manhattan (A. Docket Entries, p. 7).

On August 10, 1972, 19 months after the District Court had dismissed all Ernst claims against Providence, the District Court allowed Ernst to amend its complaint to claim $450,000 damages against Providence (A. 168).

Providence answered the Manhattan cross-claims of April 13, 1973, setting out the exclusivity of the dispute settlement procedure as a remedy for Manhattan against Providence, and setting out the effect of paragraph 31(c) of the General Conditions in confining Manhattan to an extension of the contract time as an exclusive remedy for delays allegedly caused by Providence (A. 309-52).

Providence made no claim against Manhattan for liquidated damages; such issue "was framed by the [District] Court in its pretrial order" (Finding 11, I. App. 41a; Finding 14, App. 42a). Providence did plead over against McCauley for indemnification on the claims asserted by Manhattan against Providence (Finding 11, I, App. 41a). Providence participated in discovery and in the trial in January and February, 1971, on the sufficiency of the emergency generator while its motions to dismiss Manhattan's claims were pending, and after Providence's motions to dismiss were denied. Providence counterclaimed against Ernst and cross-claimed against Fairbanks, but not against Manhattan. Providence had no arbitration agreement with any party other than Manhattan.

On December 11, 1974, after a forty day trial which commenced on August 6, 1973 (Finding 8, App. 38a), the District Court, without specifying any reason, dismissed the claims of Ernst and Manhattan against

Providence for money damages (Conclusion of Law 13, App. 68a). The District Court charged Providence with 65 days of delay in connection with the sewage ejection system [which was not mentioned in any pleading] (Finding 25, App. 44a-45a, and 29-1/2 days delay in connection with the Palco light fixtures, which was first mentioned in the cross-claim of Manhattan filed January 27, 1971 (Finding 49, App. 49a-50a, A. 92-99) and held that Providence should not deduct liquidated damages for such days of delay from the amount due Manhattan (Finding 25, App. 44a-45a; Finding 49, App. 49a-50a; Conclusion of Law 5, App. 67a). The District Court found that "Providence filed motions to dismiss for failure to arbitrate certain of the elements of controversy which were denied by the Court" (Finding 126, App. 65a). The District Court did not find that Providence failed to timely file such motions or that such motions failed to raise the arbitrability of Manhattan's claims against Providence. The District Court concluded

> During the litigation the contention was made by Providence that Manhattan's claim should be held in abeyance or denied because of failure to resort to arbitration. Providence's entitlement to arbitration is permissive and cannot operate to deny to a party its right to present its claim in a court of law. A litigant cannot fail to invoke permissive arbitration provisions of a contract and then attempt to advance this failure as a defense to claims asserted against it. (Conclusions 8, App. 67a).

The Fifth Circuit affirmed the District Court's conclusion that Providence had waived arbitration, although not because the arbitration was "permissive"; but because Providence actively defended

the claims of Manhattan and Ernst and cross-claimed against Ernst and Fairbanks for fraud associated with the emergency generator, while Providence's motions to dismiss or stay were pending or after they were denied (Decision, App. 26a; Opinion on reh., App. 31a). The Fifth Circuit, without specifying any reason, reversed the District Court's denial of Manhattan's claim for damages against Providence, directing the District Court to award Manhattan "actual delay damages arising from Providence's mistakes on the sewage ejection and bedlight fixture problems" (Decision, App. 26a).

REASONS FOR GRANTING THE WRIT

A.

The Fifth Circuit So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

This case exemplifies the continuing hostility of some courts to arbitration and contractual substantive remedies. *See Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-85 (2d Cir. 1942).

1. The District Court's finding that Providence waived its right to arbitration because of the failure of Providence to invoke arbitration is in conflict with *Shanferoke C. & S. Corp. v. Westchester S. Corp.*, 293 U.S. 449, 453-54, adopting the rationale of Learned Hand below, 70 F.2d 297 at 299, as well as *General Guar. Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924, 928 (5th Cir. 1970). The Fifth Circuit recog-

nized that Providence's motion to dismiss raised the exclusivity of arbitration (Decision, App. 26a), but held that Providence waived its right to demand arbitration by actively defending the claims of Manhattan while such motions were pending and after they were denied. The Fifth Circuit equates defending an unfounded claim to "invoking ... litigation machinery" (Opinion on reh., App. 32a). The General Conditions make "the decision of the arbitrators . . . a prior condition to any right of legal action . . ." (App. 2a). Under Alabama substantive law, ". . . submission of disputes to arbitration . . . must be complied with before an action may be brought on the contract" where, as here, arbitration was a condition precedent to suit under the contract. *Sims v. City of Birmingham*, 254 Ala. 598, 610 (1950); see also *Thompson v. St. Louis-San Francisco Ry. Co.*, 113 F.Supp. 900 (N.D.Ala. 1953) (motion to dismiss granted). Certainly, the Federal Arbitration Act, which expresses an overriding federal policy favoring arbitration by making arbitration agreements enforceable, was not intended to preempt state substantive law requiring arbitration as a condition precedent to suit, and thereby to allow a party to avoid contractually required arbitration.

2. The Fifth Circuit likewise displayed a similar hostility to a contractual substantive limitation on the remedy available. Paragraph 31(c) of the General Conditions of the Providence — Manhattan contract limited Manhattan's remedy for delays caused by Providence to an extension of the contract completion time. The District Court so construed the Providence — Manhattan contract, by granting Manhattan an extension of time (Conclusion 5, App. 67a) but denying damages for delays caused by Providence (Conclusion

13, App. 68a). The Fifth Circuit vacated without explanation (Decision, App. 26a), effectively rewriting the Providence — Manhattan contract. Compare *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 240 (the "court is then obliged to outlaw his claims, whatever may be their equity. To do otherwise is to rewrite the contract.").

3. The rationale of *Crown Coat Front Co. v. United States*, 386 U.S. 503, 511-12, that a government "contractor must seek the relief provided for under the contract or be barred from any relief in the courts", previously enunciated in *United States v. Callahan Walker Const. Co.*, 317 U.S. 56, 61; *United States v. Blair*, 321 U.S. 730, 735; *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 239-40; and applied to labor agreements in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, and the *Steelworker Trilogy* cases,[3] appears equally applicable to private construction contracts providing their own remedies and forum.

B.

The Decision Of The Fifth Circuit Is In Conflict With The Decision Of Other Courts Of Appeals.

1.

The Decision Below As To Waiver Of Arbitration Conflicts With A Decision Of The United States Court of Appeals For The Sixth Circuit.

3 United Steelworkers of America v. American Mfg. Co., 363 U.S. 564; United Steelworkers of America v. Warrior and Gulf N. Co., 363 U.S. 574; United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593.

In *Germany v. River Terminal Ry. Co.*, 477 F.2d 546 (6th Cir. 1973), (App. 73a), the Sixth Circuit held that a motion to dismiss a cross-claim for failure "to state a claim upon which relief could be granted" properly raised arbitration and further held that waiver of an agreement to arbitrate "may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of a contract, but attempts to meet all issues raised in litigation between it and another party to the agreement." The extent of the conflict between the Fifth Circuit and the Sixth Circuit is evidenced by the refusal of the Sixth Circuit to allow River Terminal to withdraw its arbitration defense on appeal "in the interest of concluding the dispute as rapidly as possible" because "the courts are concerned that the salutary results of the policy expressed in the Federal Arbitration Act be realized." 447 F.2d at 548 (App. 75a).

2.

The Decision Below Conflicts With The Decision Of The United States Court of Appeals For The Tenth Circuit As To The Deference To Be Given Under Rule 52(a), F.R.Civ.P., To The Construction Of A Purported "No Damage" Clause By The District Court.

The Fifth Circuit vacated without discussion the decision of the District Court denying Manhattan damages for delays caused by Providence (Decision, App. 26a). The District Court granted Manhattan an extension of contract completion time for such delays (Conclusion 5, App. 67a), but denied damages (Conclusion 13, App. 68a).

The District Court implicitly[4] found that the Providence — Manhattan contract contained a "no damage" clause limiting Manhattan's remedy for delays caused by Providence to contract time extension. Paragraph 31(c) of the General Conditions of the Providence — Manhattan contract is substantial evidence upon which the District Court could make such a finding. See *United States v. Rice*, 317 U.S. 61; *United States v. Howard P. Foley Co.*, 329 U.S. 64.

The Fifth Circuit gave no deference to the decision of the District Court construing the Providence — Manhattan contract to contain a "no damage" clause, as the Fifth Circuit likewise made no reference in another portion of the decision below to the similar decision of the District Court construing the Manhattan — Ernst contract to contain a "no damage" clause (Decision, App. 12a-13a). The Fifth Circuit did not apply the "clearly erroneous" standard in review, which is compelled by Rule 52(a), F.R.Civ.P.

The failure of the Fifth Circuit to give Rule 52(a) deference is directly contrary to the decision of the Tenth Circuit in *Burgess Const. Co. v. M. Morrin & Son Co., Inc.*, 526 F.2d 108 (10th Cir. 1975), (App. 76a). The Tenth Circuit in affirming the district court's construction of a "no damage" clause in *Burgess Const. Co.* held the standard of review to be whether the decision was "clearly erroneous" 526 F.2d 108, 115 (1975), (App. 83a).

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4 As the Fifth Circuit has recognized in United States v. Second National Bank of North Miami, 502 F.2d 535, 547 (5th Cir. 1974) *implicit* findings are nevertheless entitled to Rule 52(a) deference.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Willis C. Darby, Jr.
Council for Petitioner
Post Office Box 2565
Mobile, Alabama 36601

PROOF OF SERVICE

I, Willis C. Darby, Jr., the attorney for Providence Hospital, the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of December, 1977, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid to their respective attorneys of record as follows:

Attorneys for E. C. Ernst, Inc.

Glower W. Jones, Esquire
SMITH, CURRIE & HANCOCK
2600 Peachtree Center, Harris Tower
233 Peachtree Street, N. E.
Atlanta, Georgia 30303

Arthur S. Friedman, Esquire
FRIEDMAN & GASS
99 Park Avenue
New York, New York 10016

Attorney for Manhattan Construction Company of Texas

David M. Thornton, Esquire
1111 Mid-Continent Building
Tulsa, Oklahoma 74103

Attorneys for Charles H. McCauley Associates, Inc.

Maurice Bishop, Esquire
BISHOP & CARLTON
327 Frank Nelson Building
Birmingham, Alabama 35203

Clarence V. McDorman, Esquire
LONDON, YANCEY, CLARK & ALLEN
2100 First National Southern
Natural Gas Building
Birmingham, Alabama 25203

Attorney for Fairbanks-Morse, Inc.

Louis E. Braswell, Esquire
Post Office Box 123
Mobile, Alabama 36601

Willis C. Darby, Jr.
Attorney for Providence Hospital
Post Office Box 2565
Mobile, Alabama 36601

APPENDIX

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APPENDIX

EXCERPTS FROM GENERAL CONDITIONS

(THE GENERAL CONDITIONS ARE IN EVIDENCE AS A PART OF PROVIDENCE EXHIBIT 2; THE GENERAL CONDITIONS ARE REPRODUCED IN THE APPENDIX AT PP. 57-65).

[A.57]
PHS-143 Form Approved
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GENERAL CONDITIONS

* * *

[A. 58] 5. Supervision. — All work shall be done under the supervision of the Architect designated by the Owner. The Architect shall determine the amount, quality, acceptability, and fitness of all parts of the work, shall interpret the Specifications, Contract Documents, and any Extra Work Orders, and shall decide all other questions in connection with the work. The Architect shall have no authority to approve or order changes in the work which alter the terms or conditions of the contract. Upon request, the Architect shall confirm in writing any oral order, direction, requirement, or determination.

6. Architect's Decisions. — (a) It shall be the responsibility of the Architect to make written decisions in regard to all claims of the Owner or Contractor and to interpret the Contract Documents on all questions arising in connection with the execution of the work.

(b) Except as otherwise specified, all the Architect's decisions or interpretations of contract requirements are subject to arbitration.

(c) If the Architect fails to make a written decision or written interpretation of the contract requirements on any question within ten days after written request for same by either party to the contract, either party may then demand arbitration, in which event later decision by the Architect shall not stop the arbitration proceedings except with the mutual consent of both parties to the contract.

7. Arbitration. — (a) It is mutually agreed that all disputes arising in connection with this contract shall be submitted to arbitration in accordance with the provisions of the current standard Form of Arbitration Procedure of the American Institute of Architects and that all findings of fact by the arbitrators under this agreement shall be conclusive and binding on both parties. It is further mutually agreed that the decision of the arbitrators shall be a prior condition to any right of legal action which either party to the contract may have against the other.

(b) The work under this contract shall not be stopped or delayed in any way during the arbitration proceedings except by written mutual consent of both parties to the contract, and such mutual consent shall stipulate whether extension of the time for completion of the contract will be authorized by such stoppage or delay.

(c) Demand for arbitration in connection with any dispute shall be filed in writing with the Architect and with the other party to the contract. Any demand for arbitration shall be made within thirty days after the dispute has arisen if practicable, but, in any event, no demand for arbitration shall be made after the date of final payment except in the case of a dispute arising in connection with any guarantee provisions of the Contract Documents.

(d) The arbitrators hereunder shall have authority to award to the party whose contentions are approved as being in conformity with contract requirements such sums as they, or a majority of them, consider is proper to compensate the injured party for any loss in connection with the proceedings; and, if they find that the arbitration proceedings were demanded without reasonable cause, they may in addition award the injured party damages for delay, unless precluded by agreement between the contracting parties before arbitration. The arbitrators shall set their own compensation and determine the total amount of such compensation and other costs and expenses of the proceedings incurred by them, unless otherwise agreed prior to the proceedings, and shall assess the total of the costs of the proceedings upon either or both parties to the contract in such proportions as they, or a majority of them, may approve.

* * *

[A. 61] 31. Owner's Right To Stop Work or Terminate Contract; Delays, Damages. — (a) If (1) the Contractor shall be adjudged bankrupt or make an assignment for the benefit of creditors, or (2) a receiver or liquidator shall be appointed for the Contractor or for any of his property and shall not be dis-

missed within 20 days after such appointment, or the proceedings in connection therewith shall not be stayed on appeal within the said 20 days, or (3) the Contractor shall refuse or fail, after Notice of Warning from the Architect, to supply enough properly skilled workmen or proper materials, or (4) the Contractor shall refuse or fail to prosecute the work or any part thereof with such diligence as will insure its completion within the period herein specified (or any duly authorized extension thereof) or shall fail to complete the work within said period, or (5) the Contractor shall fail to make payments as specified to persons supplying labor or materials for the work, or (6) the Contractor shall fail or refuse to regard laws, ordinances, or the instructions of the Architect or otherwise be guilty of a substantial violation of any provision of this contract, then, and in any such event, the Owner, upon the certificate of the Architect that sufficient cause exists to justify such action, and without prejudice to any other rights or remedy he may have, may by 10 days' notice to the Contractor, terminate the employment of the Contractor and his right to proceed, either as to the entire work or (at the option of the Owner) as to any portion thereof as to which delay shall have occurred, and may take [A. 63] possession of the work and complete the work by contract or otherwise, as the Owner may deem expedient. In such case the Contractor shall not be entitled to receive any further payment on that work until the work is finished. If the unpaid balance of the compensation to be paid the Contractor hereunder shall exceed the expense of so completing the work (including compensation for additional managerial, administrative, and inspection services and any liquidated damages for delay), such excess shall be paid to the Contractor. If such expense shall exceed such unpaid balance, the Contractor and his

sureties shall be liable to the Owner for such excess. If the right of the Contractor to proceed with the work is so terminated, the Owner may take possession of and utilize in completing the work such materials, supplies, plant, and equipment as may be on the site of the work and necessary therefor. The expense incurred by the Owner as herein provided, and the damage incurred through the Contractor's default, shall be certified by the Architect.

(b) If the Owner does not terminate the right of the Contractor to proceed, the Contractor shall continue the work, in which event the Contractor shall pay to the Owner as fixed, agreed, and liquidated damages for each calendar day of the delay until work is completed or accepted the amount as set forth in the General Requirements section of the specification and the Contractor and his sureties shall be liable for the amount thereof.

(c) Provided that the right of the Contractor to proceed shall not be terminated, or the Contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable cause beyond the control and without the fault or negligence of the Contractor including, but not restricted to, acts of God or of the public enemy, acts of the Government, acts of the Owner, acts of another contractor in the performance of a contract with the Owner, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors due to such causes, if the Contractor shall, within ten days from the beginning of any such delay (unless the Owner shall grant a further period of time prior to the

date of final settlement of the contract) notify the Owner in writing through the Architect of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to arbitration as specified herein.

* * *

TITLE 9

ARBITRATION

§ 2. *Validity, irrevocability, and enforcement of agreements to arbitrate*

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

§ 3. *Stay of proceedings where issue therein referable to arbitration*

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

§ 4. *Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination*

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil

Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed.If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

E. C. ERNST, INC., Plaintiff-Appellant Appellee,

v.

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, Providence Hospital, Fairbanks-Morse, Inc., Charles H. McCauley Associates, Inc., Defendants-Appellees Appellants.

No. 75-1794.

United States Court of Appeals, Fifth Circuit.

May 9, 1977.

Parties to a diversity action arising from a series of disputes concerning difficulties encountered during construction and renovation of a hospital appealed from a judgment entered in the United States District Court for the Southern District of Alabama, at Mobile, 387 F.Supp. 1001, Daniel Holcombe Thomas, J. The Court of Appeals, Godbold, Circuit Judge, held, inter alia, that the subcontractor was precluded from recovering from the contractor because of the "no damage" clause in the subcontract and that the subcontractor likewise could not recover from the owner under third-party beneficiary principles.

Affirmed in part, vacated in part and remanded for further proceedings.

1. Contracts ⇐299(2)

"No damage" clause in construction contracts, whereby one party contractually limits its own liability for delay damages, although strictly construed, will be generally enforced absent delay not contemplated by parties, amounting to abandonment of contract, caused by bad faith, or amounting to active interference.

2. Contracts ⇐299(2)

Subcontractor on hospital construction project was precluded by "no damage" clause in subcontract from recovering from contractor for delays encountered in work.

3. Contracts ⇐299(2)

Construction contractor did not waive its defenses under "no damage" clause of subcontract by breaching agreement to assert subcontractor's claims for delay damage caused by owner or any subcontractor to extent permissible under contractor's contracts with such parties.

4. Contracts ⇐187(1)

Subcontractor on hospital construction project was not entitled, under third-party beneficiary theory, to recover delay damages from owner by virtue of owner's alleged abortive attempt to change to gravity sewage ejection system after contractor had begun work on pump system and its refusal to accept lighting fixtures in violation of federal regulations incorporated into contract. Code of Ala., Tit. 7A, §§ 2-102, 2-106.

5. Contracts ⇐186(1)

Construction subcontractor, by purchasing copy of plans and specifications prepared by owner's architect, did not come into contractual relationship with architect and was not entitled to sue architect for breach of implied warranty that plans were fit for their intended purpose.

6. Negligence ⇐54

Owner's architect on hospital construction project was negligent as matter of law by virtue of pattern of procrastination in approval of electrical fixtures and generator system, and was liable in damages to subcontractor for any

delays in its performance attributable to such negligence of architect.

7. Arbitration ⇐47

Owner's architect on hospital construction project was not immune from liability for delays caused by it by virtue of its arbitral/quasi-judicial functions under such contract where its inaction could fairly be characterized as delay or failure to decide rather than timely decision-making.

8. Damages ⇐140

Evidence in suit arising out of hospital construction project supported trial court's action in awarding subcontractor $61,626.12 actual damages against supplier of generator system, calculated as difference between subcontractor's price to contractor for obtaining and installing supplier's generator system and contractor's replacement cost in purchasing and installing substitute system. Code of Ala., Tit. 7A, § 2-715(2)(a).

9. Sales ⇐418(19)

Where electric generator supplied to subcontractor in hospital construction project proved defective, subcontractor had contractual claim against supplier for damages for delay sustained by subcontractor as result of such defective generator.

10. Damages ⇐94

Fact finder is not required to consider wealth of defendant as paramount in determining amount of punitive damages to be awarded; his decision to award such damages should be based on enormity of wrong and necessity of preventing similar wrongs.

11. Fraud ⇐61

Trial court, in awarding punitive damages to construction subcontractor against supplier for supplier's fraud with respect to generator furnished to subcontractor, did not err in focusing on cost of generator rather than on supplier's net worth.

12. Indemnity ⇐9(2)

General rule is that indemnification agreements contemplate payment for attorney fees incurred in litigation with third parties concerning matter indemnified against, regardless of whether they say so; inclusion of attorney fees is presumed to have been intent of drafter unless agreement explicitly says otherwise.

13. Indemnity ⇐9(2)

Where supplier agreed with construction subcontractor to indemnify subcontractor against all liabilities for damages or injuries incurred by it, and for its costs, resulting from supplier's failure to make timely delivery of specified materials, subcontractor could recover from supplier all the attorney fees that it could show were related to its litigation relating to delays caused by defective generator obtained from supplier; subcontractor was not entitled to recover fees expended in pursuit of delay damages against supplier itself.

14. Damages ⇐79(1), 80(1)

Liquidated damage provisions in contracts are enforceable under Alabama law as long as contractual stipulation is reasonable and measure of damages at time of contract was conjectural and uncertain.

15. Contracts ⇐300(3)

Under Alabama law, owner was entitled to liquidated damages for delay in completion of construction contract despite fact that it contributed to such delays itself. Code of Ala., Tit. 7A, § 2-718.

16. Arbitration ⇐23.3

Where owner liquidated claims arising out of construction contract for two and one-half years without raising contractor's failure to pursue arbitration provisions of contract, owner waived right to demand arbitration. 9 U.S.C.A. §§ 1 et seq., 3.

17. Negligence ⇐54

Contractor on hospital construction project was entitled to recover from owner's architect for actual delay damages arising from architects defective plans and specifications regarding generator system, as well as architect's procrastinations in ruling on supplier's submittals for that system.

18. Federal Courts ⇐869

Trial court was not clearly erroneous in finding, in suit under contract for construction of hospital, that contractor did not make out case of fraud by subcontractor regarding generator submittals.

19. Fraud ⇐59(1)

Where trial court found that subcontractor's supplier was guilty of fraud in its representations concerning electrical generator's ability to comply with contract specifications, contractor was entitled to recover actual damages from supplier for such fraud, if it could prove them. Code of Ala., Tit. 7, § 107 et seq.

20. Damages ⇐68

Construction contractor's claims for damages for delay in contract for construction of hospital were too uncertain in amount to qualify for allowance of prejudgment interest. 28 U.S.C.A. § 1961.

21. Contracts ⇐322(4)

Trial court's finding that contractor in hospital construction project had failed to coordinate work, leading to liquidated damages for delay to owner, was not clearly erroneous.

22. Fraud ⇐59(1)

Owner was not entitled to recover damages from subcontractor's supplier for latter's proven fraud in generator submittals under hospital construction contract where it proved no damages other than delay, for which it had already been compensated by supplier through contractor, and where it had acquired substitute generator.

Appeals from the United States District Court for the Southern District of Alabama.

Before GODBOLD, McCREE* and TJOFLAT, Circuit Judges.

GODBOLD, Circuit Judge:

This complex diversity case arises from a series of disputes concerning difficulties encountered during construction and renovation of a hospital at Mobile, Alabama. The parties are Ernst, an electrical subcontractor on the project; Providence Hospital, the owner; McCauley, the architect; Manhattan, the general contractor; and Fairbanks-Morse, Ernst's electrical supplier. After more than four years of proceedings and a 40-day bench trial, the district court entered its lengthy opinion, 387 F.Supp. 1001 (S.D.Ala.1974).

I. *Ernst's claim for damages*

Ernst's principal ground for appeal is the refusal of the district court to award it damages for delays on the job caused by the other four parties' breaches of their respective duties to Ernst. These other parties have paid Providence for

* Judge McCree, of the Sixth Circuit, participated in the oral argument of this case, but did not participate in this decision.

delays. But they have not paid damages claimed by Ernst.

A. *Ernst's claims against Manhattan*

The district court held that Manhattan's failure properly to coordinate and supervise the activities on the jobsite violated paragraph 21(c) of the general conditions of its contract with Providence, that Manhattan assumed the responsibility for delays by other subcontractors (as well as its own) under paragraph 21(b) of the general conditions, that it failed to schedule double shifts once delay had set in and thereby breached the "general requirements" of that contract, and that it failed to schedule work properly, also in violation of the general requirements.

[1] Ernst claims that it is entitled to damages for these delays caused by Manhattan. Manhattan points to the following provision of its contract with Ernst:

> An extension of time for the completion of this contract is hereby granted to [Ernst] for a period equal to any delay caused by MANHATTAN CONSTRUCTION COMPANY. Such extension of time shall be in lieu of and in full satisfaction of any and all claims whatsoever of [Ernst] against the MANHATTAN CONSTRUCTION COMPANY.

This is a reformulation of the common "no damage" clause in construction contracts whereby one party contractually limits its own liability for delay damages. Although the Alabama[1] courts have not ruled on the validity of such provisions, their validity is now well established. *See generally Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co.*, 355 F.Supp. 376, 396-401 (S.D.Iowa 1973).[2] Given their harsh effect, courts will strictly construe such provisions but generally enforce them absent delay (1) not contemplated by the parties under the provision, (2) amounting to an abandonment of the contract, (3) caused by bad faith, or (4) amounting to active interference. *Id.* at 397. Ernst claims none of these exceptions, and the delay by Manhattan does not fit any of them.

[2] Manhattan's failure to grant Ernst a time extension was not the breach of a condition precedent to Manhattan's invoking the "no damage" clause. The clause makes no reference to any such requirement for formally granting an extension; the language "an extension of time . . . is *hereby* granted" seems to suggest the opposite. The purpose for such a provision would be to assure Ernst that Manhattan (or those upstream from Manhattan) would not sue Ernst for Manhattan's own delays. No one in this case has charged Ernst for those delays; Manhattan has already been charged for them under the liquidated damage formula.

[3] Ernst also claims that Manhattan's failure to comply with a separate contractual provision operates to negate the effect of the "no damage" clause. This separate clause appears to be an agreement by Manhattan to assert Ernst's claims for delay damage caused by Providence or any subcontractor, to the extent permissible under Manhattan's contracts with those parties. We are not persuaded that the consequences of breaching this obligation should include a waiver of the "no damage" defense, which concerns damages for *Manhattan's* delays.

1. The choice of law rules of Alabama apply. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Although it is unclear from the record where the subcontract was made, this is irrelevant. The validity of contractual provisions is generally governed by the law of the place of making, but the law of the place of full performance governs where it differs from the former. *J. R. Watkins Co. v. Hill*, 214 Ala. 507, 108 So. 244 (1926); *accord, First Nat'l Life Ins. Co. v. Fidelity & Deposit Co.*, 525 F.2d 966 (CA5, 1976) (Alabama law).

2. *See also* cases cited in Annot., 10 A.L.R.2d 801 (1950).

B. *Ernst's claims against Providence*

[4] Ernst claims damages for the results of several mistakes made by Providence on the job. The district court found that Providence could not recover liquidated damages for the entirety of the delay on the job because Providence had itself created some of the overall delay by an abortive attempt to change to a gravity sewage ejection system after Manhattan had begun work on a pump system (65 days delay) and by a refusal to accept Palco lighting fixtures in violation of federal regulations incorporated into the contract (29½ days).[3] Ernst seeks to parlay these findings into a recovery for itself against Providence, pointing out that its "follow-on" electrical work was inevitably delayed to its damage by these same actions.

In order to establish that these actions breached some duty to it established by Alabama law, *see Twine v. Liberty National Life Insurance Co.*, 294 Ala. 43, 311 So.2d 299, 302 (1975), Ernst asserts a third-party beneficiary theory, citing cases imposing owner-general contractor duties and general contractor-subcontractor duties. None of these cases imposes a theory of owner-subcontractor duty. We turn elsewhere in the law of Alabama to determine the validity of third-party beneficiary liability on the facts of this case.

The Alabama courts have made it clear that one not a party to a contract cannot generally sue for its breach. *Twine, supra; Watson v. Mills*, 275 Ala. 176, 153 So.2d 612 (1963); *Land Title Guaranty Co. v. Lynchburg Foundry Co.*, 80 So. 142 (Ala.App.1918). The Alabama Supreme Court has indicated that the well-established judge-made requirement of vertical privity for manufacturers' liability should not be overturned except by legislative act. *Compare Harnischfeger Corp. v. Harris*, 280 Ala. 93, 190 So.2d 286, 290 (1966), *with Bishop v. Faroy Sales*, 336 So.2d 1340 (Ala.1976) (Alabama version of UCC 2-318 abolishes vertical privity).[4] We think judicial deference is equally applicable in the area of construction contracts.

Third parties may sue on the contract if the provision is intended for their direct, as opposed to incidental, benefit. *See, e. g., Anderson v. Howard Hall Co.*, 278 Ala. 491, 179 So.2d 71 (1965); *accord, Burgreen Contracting Co. v. Goodman*, 55 Ala.App. 209, 314 So.2d 284, *petition for cert. stricken*, 294 Ala. 199, 314 So.2d 296 (1975). The duties to Manhattan that Providence breached (the provision

3. Ernst incorrectly includes in the delays attributable to Providence an additional 39-day period of delayed access by Manhattan to the old operating room area for renovation work. The district court found that the old operating area "had necessarily been kept in operation until occupancy of the new operating area." 387 F.Supp. at 1010. This delay was not a default on Providence's part.

4. The UCC, Ala.Code tit. 7A (1966 Recomp.), does not govern the Providence-Manhattan construction contract. Ernst's contract to supply and install electrical equipment may make it a seller of goods under *id.* §§ 2-102 and -106. *See Port City Constr. Co. v. Henderson*, 48 Ala.App. 639, 266 So.2d 896 (1972). But Ernst's capacity is irrelevant to the nature of Providence's contract with Manhattan.

for a sewage ejection pump and an agreement to accept electrical wall fixtures "of equal quality" to Sunbeam fixtures) were not intended for the direct benefit of the electrical subcontractor Ernst. In a large construction project each of the individual contracts is inevitably intertwined with many others, all devoted to the general goal of finishing all phases of the project according to the plans and specifications drawn up by the architect and within the time period established under the prime contract. *See E. C. Ernst, Inc. v. General Motors Corp.*, 482 F.2d 1047, 1055 (CA5 1973). But this interrelationship by itself does not justify imposing third-party beneficiary duties, which flow not from the inevitable consequences of a breach but rather from the intent of the contracting parties.[5] Here the agreement stated in ¶ 21(a) of the general conditions that "[n]othing contained in the specifications or drawings shall be construed as creating any contractual relationship between any subcontractor and the Owner." *See* 4 A. Corbin, *Contracts* § 777, at 25 (1951):

> [I]f two contracting parties expressly provide that some third party who will be benefited by performance shall have no legally enforceable right, the courts should effectuate the expressed intent by denying the third party any direct remedy.

Ernst's effort to proceed against Providence on a third-party beneficiary basis must fail.

C. *Ernst's claim against McCauley*

[5] The district court found that McCauley, the architect for Providence, was responsible for (1) refusing to approve the Palco bedlight fixture application and (2) for the emergency generator system, (a) drawing faulty specifications[6] and (b) failing promptly to act on submittals.[7] Neither the owner-architect agreement nor the Providence-Manhattan contract made any reference to the measure of liability from McCauley to Providence. However, the district court recognized that agents are liable to their principals for their "deficiencies"[8] and utilized against McCauley the liquidated damage measure in the

5. In the construction context the nature of this intent requirement is best illustrated by the type of relationship that does give rise to third-party beneficiary liability. This is the right of subcontractors in certain situations to sue on a bond between contractor and surety made for the obvious purpose of protecting their contractual rights. *See Security Fed. Sav. & Loan Ass'n v. Underwood Coal & Supply Co.*, 245 Ala. 56, 16 So.2d 100 (1943).

6. The generator specifications were found faulty in the following regards. They violated federal requirements that the engine be identified by specific model number, they listed engines as acceptable that actually failed to satisfy the horsepower requirements, and they allocated insufficient space to accommodate the engines. 387 F.Supp. 1027–28.

This last finding is sufficient response to Fairbanks' claim that the district court charged it for delays in the emergency generator area actually caused by difficulties in housing the Caterpillar substitute. The court attributed this portion of the delay to McCauley's defective specifications and charged McCauley accordingly.

7. *I. e.*, matters referred to him, pursuant to ¶ 5–6 of the general conditions, for a decision regarding their compliance with the plans and specifications.

8. 387 F.Supp. at 1028, 1033. The court did not indicate whether it held McCauley liable under its contract with Providence or under principles of negligence. *Compare Daugherty v. Gulf Shores Motel, Inc.*, 292 Ala. 252, 292 So.2d 454 (1974) (contract), *with McPheeters v. Heard*, 332 So.2d 733 (Ala.Civ.App.1976) (negligence).

Providence-Manhattan contract because McCauley was instrumental in including this provision. 387 F.Supp. at 1033.[9] Ernst seeks the benefit of these findings, claiming that the delays in these electrical-oriented problems also delayed it. Ernst claims that it is a third-party beneficiary to the owner-architect agreement and reinvokes its earlier-dismissed negligence argument as well.[10]

McCauley raises two different theories that it argues prevent Ernst from recovering. The first, and more broadsweeping, of these challenges Ernst's status as a third-party beneficiary to the owner-architect agreement. We have already described the general rule in Alabama concerning third-party rights under contracts (in denying Ernst any rights under the owner-contractor agreement). Ernst may sue under the contract only if the particular provision is intended for its direct, as opposed to incidental, benefit. The special role of an architect on a construction project may call for third-party beneficiary rights here, although recent cases have specifically rejected this idea. *See, e. g., Detweiler Bros., Inc. v. John Graham & Co.*, 412 F.Supp. 416 (E.D.Wash.1976); *A. R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla.1973).[11] *See generally Annot.*, 65 A.L.R.3d 249 (1975). We need not decide the difficult question whether Alabama would depart from this rule, for we agree with the further holdings of the *Moyer* line of cases that contractual privity is unnecessary for recovery on a negligence theory. As the subcontractor on the project responsible for the installation of these two systems, Ernst surely falls within the scope of the risk created by McCauley's actions.[12]

[6] As we have noted, the district court characterized McCauley's delays as "deficiencies." The court did not specify whether this meant that the firm had failed to perform adequately under its contract with Providence, that it had failed to satisfy an objective standard of care required under tort principles, or both. Having ruled in favor of a theory of recovery based upon negligence, we have no difficulty in clarifying the district court's findings by deciding that McCauley's activities regarding its arbitral responsibilities on the emergency generator submittals constituted negli-

9. This ruling has not been appealed. McCauley's two-paragraph cross-appeal asserts different grounds for reversal.

10. Ernst also claims that by purchasing a copy of the plans and specifications prepared by McCauley it stood in a contractual relationship with McCauley and can sue for breach of an implied warranty that the plans were ~~and~~ fit for their intended purpose. Ernst cites no authority that supports this position, and we reject it. McCauley prepared the plans for Providence, which paid valuable consideration for them. Ernst needed them solely because its subcontract with Manhattan required it to follow them. Ernst could not be deemed a "purchaser" from McCauley to which implied warranties would run simply because it bought a copy of a document incorporated by reference in its own contract. Viewed in another light, what Ernst bought was a copy and the sole warranty was that it was a true copy of the original.

11. The *Moyer* holding appears to have been influenced by the fact that the particular agreement involved was not part of the record. (The case arose from certification by a panel of this court.) While we have the advantage that the Florida court did not, the McCauley-Providence agreement sheds little light on the subject.

12. McCauley insisted at oral argument that, should we sustain a negligence approach, Ernst would still be barred from recovery due to its contributory negligence. But the district court absolved Ernst of any fault with respect to the bedlight and generator matters under consideration here.

gence as a matter of law. They represent a pattern of procrastination [13] which, in view of the interdependence of effort so vital on a construction project, falls below the standard of care required in this situation for professional architects.[14] However, whether McCauley's erroneous rejection of Palco bedlight fixtures also constituted negligence is a closer question that we cannot answer from our appellate perspective. We leave this determination for the district court on remand. For similar reasons, we remand the question of negligence with respect to McCauley's faulty plans and specifications.

[7] McCauley's second line of defense is more troublesome. It claims that it is protected from liability for at least some of its errors by the immunity granted to architects in performing their arbitral/quasi-judicial functions. McCauley makes this immunity argument despite already having been found liable to Providence below for the same errors and having taken no appeal from that general ruling.[15] Neither the record below nor the district court's opinion reveals whether or not McCauley asserted the immunity unsuccessfully in that court-constructed [16] claim by Providence. However, McCauley did raise this bar against the claims of Ernst and Manhattan below, and it is entitled to a ruling from this court, as we address these latter claims, regarding the validity and scope of the immunity.

The leading Alabama case on immunity of architects as arbitrators is *Wilder v. Crook*, 250 Ala. 424, 34 So.2d 832 (1948). The contractor sued the owner (the city) and the engineer hired by the owner to supervise the work, claiming that the engineer's ruling as to the contractor's responsibilities under the contract was incorrect. State law required that the contractor bring suit in the county in which a "material defendant" resided; thus, if the theory of recovery against the engineer failed, suing in the engineer's county of residence would have been improper. The contractor argued that the engineer "personally assumed a duty under the [owner-contractor] contract." But because the engineer had acted pursuant to a contractual provision appointing him the arbiter of all contractual disputes, the court held that he enjoyed immunity:

> By the terms of the contract R. L. Kenan was placed in a position somewhat analogous to that of an umpire or arbitrator. His decisions were accordingly judicial in nature. Under the circumstances the authorities appear to hold that he could not be held liable in damages for failure to exercise care or skill in the performance of his functions. The same principle seems to apply even where the decision is the result of fraud or corruption.

Id. at 834.[17]

As in *Wilder*, the owner-contractor agreement here provides for the architect's ruling on questions of contract interpretation:

> It shall be the responsibility of the Architect to make written decisions in regard to all claims of the Owner or Contractor and to interpret the Contract Documents on all questions arising in connection with the execution of the work.

General Conditions ¶ 6(a). Two of McCauley's "deficiencies" fit into this arbitral/quasi-judicial category—its rejection of the acceptability of Palco bedlight fixtures and its long-term set of rulings on the acceptability of the Fairbanks emergency generator. However, with respect to both of these matters, the question is not the insulation of McCauley from suit because of a decision it made but, more accurately phrased, its immunity from suit for failing, or delaying, in making decisions.

The arbitrator's "quasi-judicial" immunity arises from his resemblance to a judge. The scope of his immunity should be no broader than this resemblance. The arbitrator serves as a private vehicle for the ordering of economic relationships. He is a creature of contract, paid by the parties to perform a duty, and his decision binds the parties because they make a specific, private decision to be bound. His decision is not socially momentous except to those who pay him to decide. The judge, however, is an official governmental instrumentality for resolving societal disputes. The parties submit their disputes to him through the structure of the judicial system, at mostly public expense. His decisions may be glossed with public policy considerations and fraught with the consequences of stare decisis. When in discharging his function the arbitrator resembles a judge, we protect the integrity of his decisionmaking by guarding against his fear of being mulcted in damages. *Cf. Broom v. Douglass*, 175 Ala. 268, 57 So. 860 (1912). But he should be immune from liability only to the extent that his action is functionally judge-like.[18] Otherwise we become mesmerized by words.

In his role as interpreter of the contract and as private decisionmaker, the arbitrator has a duty, express or implied, to make reasonably expeditious decisions. Where his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decisionmaking (good or bad), he loses his claim to immunity because he loses his resemblance to a judge. He has simply defaulted on a contractual duty to both parties.

We are mindful of the problems of characterization that may attend the distinction between delay in deciding and bad judgment in the decision itself. The idea of a misfeasance-nonfeasance dichotomy has been subject to question.

13. The nature of McCauley's activities on the job site is described in detail by the district court in its findings of fact, 387 F.Supp. at 1018–26. We discuss the particulars of the generator submittal problems below in dealing with the immunity question.

14. Of course, the mere breach of one's contract does not give rise to liability in tort, which creates duties by operation of law that are collateral to those created by agreement of the parties. *C & C Prods., Inc. v. Premier Indus. Corp.*, 290 Ala. 179, 275 So.2d 124, 130 (1972). *See also Berry v. Druid City Hosp. Bd.*, 333 So.2d 796 (Ala.1976), *reviewed in* 7 Cum.L.Rev. 355 (1976); *accord, Horton v. Northeast Ala. Regional Medical Center, Inc.*, 334 So.2d 885 (Ala.1976). Here, however, we have pretermitted whether there is a breach of a contractual duty owed to Ernst. We reach our finding of negligence without regard to the terms of McCauley's contract with Providence.

15. *See* note 9, *supra*.

16. The district court framed Providence's claim on its own through a pretrial order. The court had previously ordered Providence to pay over additional contract sums despite the existence of legal disputes about the adequacy of performance by various parties.

17. There is no indication that this rationale for immunity would not extend to suits brought in tort. Indeed, the language "failure to exercise care or skill" seems to apply directly to Ernst's negligence claim as well. *See also Broyles v. Brown Eng'ring Co.*, 275 Ala. 35, 151 So.2d 767, 772 (1963).

18. *See* 6 C.J.S. *Arbitration* § 74, at p. 289 & nn. 15–16 (1975).

See W. Prosser, *Torts* § 56, at 339–40 (4th ed. 1971).[19] But with respect to the generator submittals here, the pattern seems obvious. The tentative, incongruous, and often contradictory nature of McCauley's actions constitutes a default to all parties in the contractual sense that we have described.

The tone of McCauley's course of action was set by its first step. Fairbanks' initial application was met with the one-sentence equivocal response that the generator units were "approved providing that the requirements of the plans and specifications are met."[20] By February 1969 McCauley had discovered the foreign-manufacture problem. In April it shifted its criticism to the problem of available spare parts. It then shifted to a complaint that the engines were not a standard product and did not meet the horsepower requirement. It then urged resubmittal. In the view of the district court, the result of this last action was "to start the entire process over again from the beginning at a time when construction progress was already seriously impeded." 387 F.Supp. at 1021. After it had rejected two more resubmittals, McCauley wrote Manhattan in September 1969 asking for verified horsepower tests. McCauley called a meeting at the end of October, the result of which was to ask for another submittal, this time with a different engine. By now, Manhattan had become seriously concerned about the delays resulting from McCauley's failure to take definitive action. Three times in December 1969 and January 1970 Manhattan wrote McCauley to spur the latter to action. McCauley's failure to do anything prompted Manhattan to request an unlimited extension of the completion date because of this lack of cooperation. Equivocation continued. At a March 1970 meeting, McCauley first said that it would accept the generator subject to tests, then agreed to accept it prior to tests. Six days later, McCauley changed its mind and disapproved the system. Even so, not until May of that year did McCauley finally ask for a new system, specifying the particular models that would be acceptable. Throughout this entire time period McCauley consistently failed to list its reasons for disapprovals, a step which could perhaps have been used to resolve the growing impasse. This pattern of action demonstrates a consistent failure to make decisions in a way that could enable construction to continue. Only McCauley had the authority to make these decisions, and it failed to fulfill that responsibility. The resulting damages Ernst seeks here represent compensation not for McCauley's finally selecting a different generator system but

19. *But cf. Berry v. Druid City Hosp. Bd.*, 333 So.2d 796, 799–800 (Ala.1976) Shores & Almon, JJ., with Embry, J., & Heflin, C. J., concurring on this point). While its interpretation is not free from doubt, Justice Shores' dictum in *Berry* has announced as a rule in Alabama that one who clearly has a cause of action for breach of contract can also recover in tort only if the defendant's action can be characterized as misfeasance. Here, we view McCauley's action as nonfeasance and yet do not disallow recovery based on negligence. But Ernst has no separate contractual claim. Even if it did, we think the cases that Justice Shores relied upon in *Berry* make it clear that the rule would not bar Ernst's recovery in tort here. *See Old S. Life Ins. Co. v. Woodall*, 295 Ala. 235, 326 So.2d 726 (1976); *C & C Prods., Inc. v. Premier Indus. Corp.*, 290 Ala. 179, 275 So.2d 124 (1972). We understand these cases to say that the breach of contract, without more, cannot justify recovery in tort. *See* note 14, *supra*. They do not deny the right to a tort recovery here.

20. Manhattan Exh. 36.

rather for this failure to decide. We cannot extend the arbitral immunity to such conduct.

We next examine McCauley's claim of immunity with respect to its rejection of Palco bedlight fixtures.[21] Here, the district court found a pattern of action similar to, though less drawn out than, its response to the generator submittals.[22] In characterizing McCauley's activities, we take care in distinguishing Providence's decisions from McCauley's responsibilities as arbitrator. Providence made a decision in advance of bid submissions that only Centron-5 fixtures would do. This decision (a wrong one for which Providence has been charged) was different from the architect's decision on subsequent submittals. With respect to this responsibility, McCauley never acted. "McCauley refused even to look at a sample of the Palco fixture delivered to its offices." 387 F.Supp. at 1017. Later, each of the Palco submittals was marked "disapproved for reasons noted"; yet McCauley gave no such reasons. *Id.*[23] While this failure to arbitrate is admittedly tied closely to Providence's earlier affirmative decision to accept only Centron-5 fixtures, McCauley had decisional responsibilities subsequent to this and independent of its status as advisor to the owner. It failed to exercise these responsibilities, and so here, too, it cannot obtain immunity in damages. As noted above, we leave for the district court the question whether this "deficiency" constituted negligence.

Ernst's claim that defects in McCauley's generator plans and specifications also contributed to its delays challenges mistakes not even arguably made in the capacity of arbitrator. We read *Broyles v. Brown Engineering Co.*, 275 Ala. 35, 151 So.2d 767 (1963), as imposing upon architects drawing up plans and specifications not "a contract of guaranty or insurance of favorable results," *id.* at 771, but "a guaranty of reasonable results," *id.* at 772. *See Centraal Stikstof Verkoopkanter, N.V. v. Walsh Stevedoring Co.*, 380 F.2d 523, 529–31 (CA5 1967) (interpreting *Broyles*). We interpret this implied warranty under contract to be equally applicable under negligence claims. The facts of *Broyles* confirm this view. The plaintiffs in that case had failed to allege negligence, and the court's opinion sought to protect them by finding a similar duty implied under the contract:

> Certainly a contracting party has a right to expect the survey to be done with *reasonable accuracy chargeable to the profession*, and should not be dependent in his effort to recover damages on *an allegation of negligence or unskillful and imprudent work*.

151 So.2d at 772 (emphasis supplied).[24] Again, if the district court finds on remand that the "deficiencies" in the plans and the specifications constituted negligence, then Ernst is entitled to recover for its delay damages attributable to this particular act.

21. The parties have not briefed the question of the effect here of federal regulations requiring competitive bidding. We decline to enter this thicket on our own.

22. *See* 387 F.Supp. at 1017–18 (findings 47-49).

23. We do not hold that architects-as-arbitrators must issue satisfactory statements of reasons for their decisions in order to maintain their immunity from suit. We point to this action by McCauley only as evidence of its failure to rule on the Palco submittals at all.

24. For a list of similar cases supporting liability of architects to third parties for defects in plans and specifications, see Annot., 65 A.L.R.3d 249 (1975).

D. *Ernst's claims for damages from Fairbanks*

[8] The court awarded Ernst $61,626.12 actual damages against Fairbanks (in addition to a pass-through of liquidated damages to Providence). This figure represents the difference between Ernst's price to Manhattan for obtaining and installing the Fairbanks generator system and Manhattan's replacement cost in purchasing and installing the substitute Caterpillar-driven system. As such, it is simply an indemnity to Ernst for its payment of this same amount to Manhattan.

Despite objections by both parties to this figure, we uphold its propriety. Ernst claims, in effect, that Fairbanks should pay its installation fee. But Ernst never installed anything. Fairbanks claims that $12,764.59 of the $61,626.12 figure is a windfall to Ernst. The theory here is that Ernst should bear the loss represented by Manhattan's installation expenses, since Fairbanks never contracted to install a generator but only to supply one. This seems a simple case of requiring the breaching party in a contract for the sale of goods to pay consequential damages. Ala.Code tit. 7A, § 2-715(2)(a) (1966 Recomp.).

[9] Ernst claims in addition that Fairbanks should pay its share of any damages for the delay sustained by Ernst as a result of the defective generator. We agree that Ernst has a contractual claim against Fairbanks for this consequence of the latter's breach. The district court should determine the extent of these delay damages actually caused by Fairbanks.

[10, 11] The district court also charged Fairbanks with punitive damages for its fraud with respect to the generator matter. Ernst [25] appeals from this award to it of $20,000 in punitive damages on ground that the court focused too sharply on the cost of the generators rather than on Fairbanks' net worth. The factfinder is not required to consider the wealth of the defendant as paramount. His decision to award punitive damages should be based on "the enormity of the wrong and the necessity of preventing similar wrongs." *Loch Ridge Construction Co. v. Barra*, 291 Ala. 312, 280 So.2d 745, 751 (1973). The district court here recognized this principle in observing generally that "the greater the wrong the greater the damage." 387 F.Supp. at 1031. The amount of punitive damages was within the discretion of the trier of the facts.

E. *Problems of proof on remand*

On remand the court will face the question of whether Ernst has satisfactorily proven that the extended time devoted by its personnel to this project has resulted in financial loss.[26] We intimate no view on this question. Ernst must also prove to what extent the actionable failings of Fairbanks and McCauley were responsible for these alleged losses. Its proof of the fact of loss should be measured against the "reasonably certain" standard adopted in *United Bonding Insurance Co. v. W. S. Newell, Inc.*, 285 Ala. 371, 232 So.2d 616, 624 (1969). And its proof of amount of loss, as well as

25. Manhattan also appeals from an identical punitive damage award to it from Fairbanks, adopting the arguments made by Ernst. Our holding applies to both appeals.

26. Because of its liquidated damage clause, Providence did not confront this issue. Ernst, unlike Providence, has no time-based measure of damages by which it may automatically assess and apportion its damages.

attribution to the above two causes, should be governed by the "fair and reasonable estimate" language cited in *Newell*. The appellees argue for the application of a nonapportionment rule, based upon *Kershaw Mining Co. v. Lankford*, 213 Ala. 630, 105 So. 896 (1925). We see the *Kershaw* rule as simply a refinement of the general proposition in Alabama that damage must be proven with reasonable certainty. See *Mobile & O. R. Co. v. Red Feather Coal Co.*, 218 Ala. 582, 119 So. 606, 609 (1928) (dictum) (citing *Kershaw*). Where the plaintiff does present evidence of attribution to various causes, he may recover under the reasonable certainty standard. *See Tanner v. Case*, 277 Ala. 641, 173 So.2d 803, 808 (1965).

Unlike the plaintiff in *Kershaw*, Ernst faces four defendants all of whom together were in fact responsible for the great majority of its damages. Each seems to point its finger at the others. Fairbanks, for example, claims that its fraud caused no delays in the generator installation because other pre-existing delays were concurrent with its fraud. In this context, the district court can, as it did regarding Providence's claims, ascertain Ernst's total damages and then, where there exists a legal duty to Ernst as discussed above, allocate respective responsibilities for those damages based upon reasonable certainty.

F. *Ernst's claim for attorney's fees*

The district court refused to award Ernst attorney's fees on the basis of Fairbanks' agreement in its contract with Ernst to "*indemnify* [Buyer] against all liabilities for damages or injuries incurred by the Buyer, for Buyer's cost, resulting from Seller's failure to make timely delivery of the materials specified herein." (Emphasis supplied).

In Alabama attorney's fees are not recoverable unless provided for in the contract or by statute. *State v. Alabama Public Service Commission*, 307 So.2d 521, 540 (Ala.1975). The district court did not examine whether the above indemnity provision constituted such a contractual provision for fees but skirted this issue by ruling:

> Without characterizing the elements constituting the quantum of punitive damage, suffice it to say, the Court does not feel that any additional amount should be added to this for attorney fees and expenses.

387 F.Supp. at 1034. We do not know how to interpret this conclusion. If the court was in fact including within its $20,000 punitive damage award some indeterminate compensatory amount for fees, then it applied a legal theory that has since been rejected. An intervening decision of this court, *Burgess v. Williamson*, 506 F.2d 870, 877 78 (CA5 1975), has held that Alabama does not include a punitive damages exception to the general rule against compensatory recoveries of attorney's fees. On the other hand, perhaps the district court did not really decide that an award of attorney's fees was appropriately included within punitive damages. In either case, we face the question that the district court avoided: does the above agreement to indemnify against "liabilities for damages . . . for . . . cost" resulting from Fairbanks' delay provide a basis for Ernst to recover its attorney's fees? We hold that it does, to some extent.[27]

27. Our holding may require some re-evaluation by the district court of its $20,000 punitive damages award to Ernst. If the court was requiring the payment of attorney's fees as

[12] The Alabama courts have not squarely addressed the issue of whether or when indemnity agreements contemplate the payment of attorney's fees. *Cf. Miller & Co. v. Louisville & Nashville R.R.*, 328 F.2d 73, 78 (CA5), *cert. denied*, 377 U.S. 966, 84 S.Ct. 1648, 12 L.Ed.2d 737 (1964) (Alabama law), holding that judgment against the indemnitee in a third party's suit would entitle it to "the costs of defending the claim" as well as the amount of liability. *Miller* at least suggests that Alabama would follow the generally held view that indemnification agreements contemplate payment for attorney's fees incurred in litigation with third parties concerning the matter indemnified against, regardless of whether they say so. See, *e. g., Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 491 F.2d 192, 198 n. 9 (CA8 1974); *Insurance Co. of North America v. King*, 340 So.2d 1175 (Fla.D.Ct.App.1976); *cf.* 5 A. Corbin, *Contracts* § 1037, at 225–26 (1964 & Supp.1971). Inclusion of attorney's fees is presumed to have been the intent of the drafter unless the agreement explicitly says otherwise.[28] This rule simply gives effect to the very nature of indemnity, which is to make the party whole. "[T]rue indemnification would contemplate the inclusion of these items . . . ." *Seaboard Coast Line Railroad v. Tennessee Corp.*, 421 F.2d 970, 975 (CA5), *cert. denied*, 398 U.S. 928, 90 S.Ct. 1819, 26 L.Ed.2d 91 (1970) (dictum). The reference to "cost" in the Ernst-Fairbanks agreement was not an explicit denial of the right to attorney's fees. We do not even interpret it to be an implied denial,[29] although in view of the rule above we need not go this far. As a result, we hold that the agreement contemplates recovery of relevant attorney's fees.

[13] The cases cited above limit the recovery of attorney's fees to the subject matter of the indemnity agreement and exclude fees expended in suing the indemnitor in order to recover under the agreement. Accordingly, Ernst may recover from Fairbanks only those fees that it can show were related to its litigation of the generator matter.[30] This leaves the question whether Ernst can recover fees expended in pursuit of delay damages against Fairbanks itself. This is not precisely what the rule contem-

part of the $20,000, Fairbanks should not now have to pay again for these fees under an indemnity theory. While our own scrutiny of punitive damages awards is limited, we think the district court should be permitted to re-evaluate its award in light of *Burgess*.

28. The fact that there is no need for a specific provision in the contract is perhaps best evidenced by cases applying the rule to indemnities arising by operation of law. *See, e. g., Dow Chem. Co. v. Barge UM-23B*, 424 F.2d 307, 312 (CA5 1970); *Celotex Corp. v. Becknell Constr., Inc.*, 325 So.2d 566 (Miss.1976).

29. *Compare Pennsylvania R.R. v. Chicago, M., St. P. & P. R.R.*, 389 F.2d 67, 70 (CA7 1968) (alternative holding) ("all judgments and costs that may be rendered" refers only to court costs, not attorney's fees), *with B & G Elec. Co. v. G. E. Bass & Co.*, 252 F.2d 698, 701 (CA5), *cert. denied*, 357 U.S. 931, 78 S.Ct. 1372, 2 L.Ed.2d 1371 (1958) (" 'Any expense' includes, of course, attorney's fees"). The provision for "cost" here is more probably used as synonymous with "expense." It says nothing about the costs being "rendered" with a "judgment," which reference might imply the more technical concept of court costs. *Cf. Fitzpatrick v. Bitzer*, 427 U.S. 445, 459–460, 96 S.Ct. 2666, 2673, 49 L.Ed.2d 614, 624 (1976) (Stevens, J., concurring).

30. These would include the original declaratory judgment action Ernst brought against Manhattan insisting that the Fairbanks generator conformed to the specifications. Application of the general rule does not depend upon who was the plaintiff in the third-party litigation.

plates when it denies a right of recovery for fees expended in pursuit of indemnity itself. However, we still find recovery for this portion of the fees inappropriate. The terms of the agreement speak of indemnity for "liabilities." To us, this seems to refer to the classic indemnity situation whereby one party agrees to pay a second for all the consequences of legal action concerning a third. It does not mean indemnity against all financial damage suffered.

In sum, Ernst may recover for attorney's fees expended only in connection with the generator litigation, excluding that part of such litigation involving Ernst's claims against Fairbanks. The district court ruled that such apportionment would be impossible, given the vast number of claims in this suit. But it did so without allowing any proof about attorney's fees at all, that matter being reserved for post-trial consideration. On remand, the court should consider evidence on this issue, with due regard to the reasonable certainty standard articulated above.

II. *Ernst's challenge to Providence's liquidated damage recovery*

At an early stage of this proceeding, the district court ordered Providence to pay over an added portion of the contract price (through Manhattan) despite the existence of various disputes concerning the work. The court then framed by a subsequent pre-trial order the question of Providence's entitlement to liquidated damages under its contract with Manhattan, at the rate of $250 per day of delay. As we have noted, the court then proceeded to the difficult task of ascertaining which parties were responsible for which parts of the delays. It ordered McCauley to pay its share and ordered the three other parties (through Manhattan) to pay their shares, deducting these from the balance of the contract price which Providence had yet to pay.

[14] Liquidated damage provisions in contracts are enforceable under Alabama law as long as the contractual stipulation is reasonable and the measure of damages at the time of the contract was conjectural and uncertain. This rule has been applied to provisions against delay in performance on construction contracts. *Otinger v. Water Works & Sanitary Sewer Board*, 278 Ala. 213, 177 So.2d 320 (1965). None of the parties disputes the conjectural nature of delay damage in a case like this one or the lack of disproportion in the $250 per day damage formula.

[15] However, Ernst seeks to avoid an assessment of liquidated damages by the so-called rule against apportionment.[31] This rule states that under a liquidated damage provision against delay, where the owner has contributed to delays on the project he may not apportion the fault but forfeits all right to recover under the provision. The rule has been adopted by some jurisdictions but rejected by others.[32] The Alabama courts have never been presented with the decision of whether to adopt it or allow apportionment. *Cf. Kershaw Mining Co., supra* (concerning apportionment for actual damages).

31. Ironically, Ernst seeks a recovery based on proportional fault of actual damages but opposes Providence's attempt to so recover by way of a damage formula provided for in the contract.

32. *See* Annot., 152 A.L.R. 1349, 1359–78 (1944).

Like the Alabama district judge, we believe that Alabama would permit apportionment of fault. The opposing rule is an old one whose underlying policies do not remain in full force. One of the dominant reasons underlying it is early judicial hostility to the use of privately agreed upon contract damage remedies. See, *e. g., Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N.Y. 479, 93 N.E. 81 (1910):

> While such an agreement has not the harshness of a penalty, it is, nevertheless, in its nature, such that its enforcement, where the party claiming the right to enforce has, in part, been the cause of delay, would be unjust.

Today, given the increasing complexity of contractual relationships, liquidated damage provisions have obtained firm judicial and legislative support. See, *e. g., Otinger, supra;* Ala.Code tit. 7A, § 2-718 (1966 Recomp.). As long as the owner's own delay is not incurred in bad faith, it is not unjust to allow proportional fault to govern recovery. Generally, owners do not benefit from delays that they incur. Another reason cited in support of the rule is that proving apportionment is simply too difficult. We do not disagree with the difficulty of the task,[33] but recovery should not be barred in every case by a rule of law that precludes examination of the evidence.[34] The district court did not err in allowing apportioned liquidated damages to Providence.

III. *Ernst's appeal on the electrical receptacles*

Ernst concedes that its workmen installed the receptacles improperly but claims that this caused no delay (*i. e.*, no damage). The district court's findings of delay, 387 F.Supp. at 1014-15, are not clearly erroneous.

IV. *Manhattan's claims for delay damages*

Like Ernst, Manhattan claims actual damages for delays resulting from other parties' mistakes. Much of what we have said about Ernst's claims applies with equal force to Manhattan's, but we examine each party's potential liability to Manhattan separately.

A. *Claims against Providence*

[16] Manhattan's claim here is stronger than that of Ernst, since Manhattan and Providence stood in privity of contract. Providence contends, however, that by failing to pursue the arbitration provisions of the general conditions in their contract,[35] Manhattan cannot assert

33. There are two different levels of "apportionment" that the district court had to reach here. The first was apportioning damage (*i. e.*, the number of days of delay) in fact caused by each of the problems on the project. On this issue the court "[found] it impossible to affix periods of delay with any degree of accuracy, except with respect to the emergency generator, the explosion-proof receptacles and the bedlight fixtures." 387 F.Supp. at 1011. The court nevertheless assigned a delay time to each problem. Apportionment in this sense of the term, under liquidated damage provisions, is an apportionment of time.

The second step, necessary only for the generator and the bedlight fixture problems, was apportioning fault for a given delay between its two contributors. The court split fault equally for both of these problems. *Cf. United States v. Reliable Transfer Co.*, 421 U.S. 397, 407, 95 S.Ct. 1708, 44 L.Ed.2d 251, 260 (1975).

34. Increasingly the courts are apportioning fault in negligence cases by application of rules of comparative negligence.

35. "6. *Architect's Decisions.*—(a) It shall be the responsibility of the Architect to make written decisions in regard to all claims of the Owner or Contractor and to interpret

its claim in federal court. Manhattan's response is that the activities of Providence constituted a waiver of the right to demand arbitration. The district court agreed, and we do also.

This question is one of federal law, given the enactment of the United States Arbitration Act of 1925, 9 U.S.C. §§ 1 *et seq.*,[36] even though this is a diversity case. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-05, 87 S.Ct. 1801, 18 L.Ed.2d 1270, 1278 (1967); *accord, Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433, 437 (CA6 1975). Section 3 of the Act reads:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.* [Emphasis supplied].

The first indication of the parties' attitude about arbitration is an April 7, 1970, telephone conversation to Manhattan from Providence's attorney, in which the attorney

> pointed out that the Architect turned down the [D]orman engine in September of 1969. He further contends that by not requesting arbitration within the following six months period, the contractor waived his right for arbitration. He proposed that if they, at this point, requested arbitration, Providence Hospital will file a suit in federal court asking that arbitration be dis-

the Contract Documents on all questions arising in connection with the execution of the work.

"(b) Except as otherwise specified, all the Architect's decisions or interpretations of contract requirements are subject to arbitration.

"(c) If the Architect fails to make a written decision or written interpretation of the contract requirements on any question within ten days after written request for same by either party to the contract, either party may then demand arbitration, in which event later decision by the Architect shall not stop the arbitration proceedings except with the mutual consent of both parties to the contract.

"7. *Arbitration.*—(a) It is mutually agreed that all disputes arising in connection with this contract shall be submitted to arbitration in accordance with the provisions of the current Standard Form of Arbitration Procedure of the American Institute of Architects and that all findings of fact by the arbitrators under this agreement shall be conclusive and binding on both parties. It is further mutually agreed that the decision of the arbitrators shall be a prior condition to any right of legal action which either party to the contract may have against the other.

". . . .

"(c) Demand for arbitration in connection with any dispute shall be filed in writing with the Architect and with the other party to the contract. Any demand for arbitration shall be made within thirty days after the dispute has arisen if practicable, but, in any event, no demand for arbitration shall be made after the date of final payment except in the case of a dispute arising in connection with any guarantee provisions of the Contract Documents."

36. Though no explicit finding was made, the Providence-Manhattan contract obviously is a transaction involving commerce, so the Act applies. Insofar as *Gavlik Constr. Co. v. H. F. Campbell Co.*, 526 F.2d 777, 784 (CA3 1975), suggests the need for explicit findings in a case involving this clear a dependence upon interstate commerce, we decline to follow it

allowed and that the contractor be required to furnish an engine meeting specifications.[37]

The only other evidence of any pre-suit reference to arbitration is a September 17, 1970, letter to Manhattan from its own attorney. This letter asked Manhattan to date, sign, and complete an enclosed AIA Demand for Arbitration and file it with the AAA Regional Office, sending copies to Providence and McCauley.[38]

Ernst's complaint initiated this suit on October 28, 1970. Providence's initial pleading, filed December 16, 1970, was captioned as a "motion to dismiss" Manhattan's claim and alternatively "to stay the action." The requested "stay" was not for purposes of resort to arbitration but to require Manhattan to finish construction first. Attached to the motion was a copy of the 20-page general conditions of the contract, paragraphs 6 and 7 of which concerned arbitration. Providence filed a supplemental brief which referred to arbitration but only as a ground for dismissing Manhattan's suit. For the next two and a half years Providence litigated—it engaged in discovery, presented cross-claims (trying to appeal to this court from dismissal of some of them), and filed various motions.[39] It never brought up arbitration except to deny Manhattan's assertion that it (Manhattan) had earlier sought arbitration pursuant to the contract. In May (or possibly April) 1973, Providence for the first time asserted that Manhattan's sole remedy was arbitration. In view of this pattern of pre- and post-suit behavior, Providence waived arbitration. *Burton-Dixie Corp. v. Timothy McCarthy Construction Co.*, 436 F.2d 405, 408 09 (CA5 1971); *Cornell & Co. v. Barber & Ross Co.*, 123 U.S.App.D.C. 378, 360 F.2d 512 (1966).[40]

On remand the district court should find Manhattan's actual delay damages arising from Providence's mistakes on the sewage ejection and bedlight fixture problems.[41]

B. *Claims against McCauley*

[17] Manhattan's claims in this regard are similar to Ernst's. Manhattan's closer relationship to the architect makes an even more persuasive case for its inclusion within the scope of the risk created by the latter's actions. Manhattan may recover on remand for actual delay damages arising from McCauley's defective plans and specifications regarding the generator system (if such be found to constitute negligence) as well as the architect's procrastinations in ruling on Fairbanks' submittals for that system.

37. Ernst Exh. 268. This assertion that Manhattan had already waived arbitration had no merit. The architect had not rejected the Dorman engine in September 1969 but, as we have indicated, was in the midst of almost two years of indecision.

38. There is no evidence that this demand was ever executed.

39. For this reason, this case is distinguishable from *General Guar. Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924 (CA5 1970), holding that one does not waive his right to a stay for arbitration by failing to file a pre-suit demand for it.

40. Manhattan is not barred by failing to obtain a "certificate of completion" pursuant to the general conditions. Its appeal is concerned not with obtaining final payment but rather with securing delay damages in addition to final payment. We note that McCauley did give Manhattan a "certificate of acceptance," dated June 21, 1972, accepting the building as complete in accordance with plans, specifications, and contract documents.

41. *See* part I, section E, *supra*.

C. *Claims against Ernst*

[18] The district court was not clearly erroneous in finding that although it was "an extremely close question," 387 F.Supp. at 1028, Manhattan did not make out a case of fraud by Ernst regarding the generator submittals.

The court also found that Ernst knowingly installed the explosion-proof receptacles in an improper and hazardous manner and then concealed this danger by using longer screws. But the court did not rule on the question whether this action constituted fraud under Alabama law. Manhattan raised this issue throughout the trial,[42] and the district court should make appropriate findings and conclusions on remand.

Manhattan's claims for damages against Ernst on this receptacle matter are complicated by a subcontract provision[43] which the district court appears to have referred to in passing[44] but which we cannot find in the record. On remand the district court should make findings on the existence of, and conclusions on the interpretation of, this provision in the subcontract.

D. *Claims against Fairbanks*

[19] The district court found Fairbanks guilty by clear and convincing evidence of fraud in its representations concerning the generator's ability to comply with the specifications. It awarded Manhattan $20,000 in punitive damages for this fraud but did not grant compensatory damages, even though it found that "[t]he other parties did rely upon the misrepresentations with the result that the project was delayed and substantial losses were incurred." 387 F.Supp. at 1031. Alabama law allows recovery of compensatory damages in cases of statutory fraud. Ala.Code tit. 7, §§ 107 *et seq.* (1960 Recomp.); *Ringer v. First National Bank*, 291 Ala. 364, 281 So.2d 261 (1973). On remand, Manhattan is entitled to recover actual damages from Fairbanks if it can prove them.

E. *Claim for prejudgment interest*

[20] Manhattan claims prejudgment interest on any damage award that it may receive. Alabama law governs any award of interest, regardless of the existence of 28 U.S.C. § 1961. *Degelos Bros. Grain Corp. v. Fireman's Fund Insurance Co.*, 498 F.2d 1238 (CA5 1974). In Alabama only liquidated claims generally justify prejudgment interest. *Grand Bay Land Co. v. Simpson*, 207 Ala. 303, 92 So. 789 (1922). The claims of Manhattan here are too uncertain in amount to qualify under any of the recognized exceptions to this rule. *Roe v. Baggett Transportation Co.*, 326 F.2d 298 (CA5 1963) (Alabama law); *accord, Belcher v. Birmingham Trust National Bank*, 488 F.2d 474 (CA5 1973).

42. Record on Appeal 1281. Our reading of the record does not reveal with certainty whether the district court ever ruled on this claim with finality. The court granted Ernst's motion to dismiss the claim on May 9, 1973, without opinion. *Id.* at 1366. But it would seem to be included within the scope of the pretrial order setting issues for trial, and it later became subject to various motions by Manhattan. *Id.* at 1625, 2064.

43. According to Ernst, this provision read:

> Limit of liability for delay in completion on part of E. C. Ernst, Inc. shall be no greater than the penalty as set up in the Owner's contract.

Reply Brief for Ernst 40 n. **.

44. *See* 387 F.Supp. at 1004-05 (finding 3), 1009, 1033 (finding 128).

V. *Manhattan's liability for liquidated damages*

[21] Manhattan claims that the district court was clearly erroneous in finding that it failed to coordinate work, leading to liquidated damages for delay to Providence. The only claim worthy of discussion here is that a general "flattening out" of work occurred after the generator delays had set in. The district court recognized this problem, 387 F.Supp. at 1027, but apparently found it to be no excuse to a party whose responsibility as general contractor included eliminating the effect of such occurrences, and we agree.

VI. *Providence's claims*

[22] We agree with the district court that Providence's claim for damages from Fairbanks' proven fraud could not withstand a motion to dismiss. Providence has proven no damages other than delay, and for this it already has been compensated by Fairbanks (through Manhattan). Providence now has a Caterpillar-driven generator in place of the Dorman-powered one that never materialized. In addition, as noted above, the district court's refusal to find Ernst guilty of fraud in connection with the generator matter was not clearly erroneous.

VII. *Summary*

1. Ernst may not recover from Manhattan, because of the "no damage" clause in their subcontract.

2. Ernst may not recover from Providence, since the Providence-Manhattan contract evidences an intention not to vest Ernst with third-party beneficiary rights.

3. The liquidated damages assessed against Fairbanks by the district court did not include delays caused by defective specifications for the emergency generator's engine housing. McCauley was properly assessed responsibility for this mistake.

4. Ernst may recover under a negligence theory for McCauley's procrastinations in rejecting the Fairbanks emergency generator units.

5. Ernst may recover under a negligence theory for McCauley's erroneous rejection of Palco bedlight fixtures and its defective plans and specifications if, on remand, the district court finds that these defects constitute negligence.

6. The district court's calculation of $61,626.12 as the indemnity due Ernst from Fairbanks for Ernst's upstream liability on the generator is correct.

7. Ernst may recover damages for delays caused by Fairbanks' breach of contract.

8. The district court's $20,000 award of punitive damages from Fairbanks to Manhattan was not an abuse of its discretion.

9. The district court's $20,000 award of punitive damages from Fairbanks to Ernst was not an abuse of its discretion. However, the court should reduce this figure on remand if it included some amount compensating Ernst for its attorney's fees.

10. Ernst may recover attorney's fees from Fairbanks based on their indemnity agreement. However, this recovery should be limited to amounts expended on the generator litigation, excluding suit against Fairbanks itself.

11. The district court did not err in allowing apportioned liquidated damages to Providence.

12. The district court did not err in finding that Ernst was responsible for delay arising from its installation of the explosion-proof receptacles.

13. Manhattan may recover for its actual delay damages arising from Providence's mistakes on the sewage system and Palco bedlight fixture matters.

14. Like Ernst, Manhattan may recover under a negligence theory for McCauley's procrastination in rejecting the Fairbanks emergency generator units.

15. Like Ernst, Manhattan may recover under a negligence theory for McCauley's erroneous rejection of Palco bedlight fixtures and its defective plans and specifications if, on remand, the district court finds that these defects constitute negligence.

16. The district court did not err in rejecting Manhattan's and Providence's claims of fraud by Ernst in counseling Fairbanks on its generator submittals.

17. Manhattan's claim for actual delay damages from Ernst on the explosion-proof receptacles matter is remanded for further consideration concerning the existence and effect of a provision in their subcontract. The district court should also make an explicit finding regarding the existence of fraud on Ernst's part in connection with the installation of the receptacles.

18. Manhattan may recover compensatory damages for Fairbanks' fraud.

19. Manhattan may not recover prejudgment interest on any damage award that it may receive.

20. The district court did not err in assessing liquidated damages for delay against Manhattan for its failure to coordinate the work on the job site.

21. Providence has proven no damages for which it has not already been compensated with respect to Fairbanks' fraud.

22. On remand, Ernst and Manhattan's recoveries will be predicated on their ability to show fact, amount, and apportionment of damage with reasonable certainty.

The district court's judgment is AFFIRMED in part, VACATED, in part, and REMANDED for further proceedings not inconsistent with this opinion.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Susan M. Stamper
Deputy
New Orleans, Louisiana OCT 3 1977

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

E. C. ERNST, INC., Plaintiff-Appellant Appellee,

v.

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, Providence Hospital, Fairbanks-Morse, Inc., Charles H. McCauley Associates, Inc., Defendants-Appellees Appellants.

No. 75-1794.

United States Court of Appeals, Fifth Circuit.

Sept. 14, 1977.

In a complex diversity case, concerning difficulties encountered during construction and renovation of a hospital, the parties appealed from a judgment entered in the United States District Court for the Southern District of Alabama, at Mobile, Daniel H. Thomas, J., 387 F.Supp. 1001. The Court of Appeals affirmed in part, vacated in part and remanded for further proceedings, 551 F.2d 1026. On petition for rehearing and petition for rehearing en banc, the Court of Appeals held that (1) a subcontractor was entitled to profit that it would have earned for installing a generator pursuant to contract, not the full amount it would have charged the contractor had there been no breach by supplier, but profit on the installation job, though only if amount of profit could be shown with reasonable certainty; (2) extensive postsuit actions in all phases of complex litigation served as a waiver of the hospital's right to demand arbitration of grievances, and (3) where the hospital was given opportunity to have its fraud claim reinstated and considered during trial but elected not to avail itself of the offer, the hospital was in no position to complain of want of opportunity to prove fraud damages.

Granted in part and denied in part; petition for rehearing en banc denied.

1. Damages ⇐117

Damages awarded for breach of contract should return party to position he would have occupied had contract not been violated.

2. Damages ⇐124(3)

Subcontractor was entitled to profit that it would have earned for installing generator pursuant to contract, not full amount it would have charged contractor had there been no breach by supplier, but profit on installation job, though only if amount of profit could be shown with reasonable certainty.

3. Arbitration ⇐23.4

Extensive postsuit actions in all phases of complex litigation served as waiver of party's right to demand arbitration of grievances.

4. Federal Courts ⇐714

Where landowner was given opportunity to have its fraud claim reinstated and considered during trial but elected not to avail itself of offer, landowner was in no position to complain of want of opportunity to prove fraud damages

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Appeals from the United States District Court for the Southern District of Alabama.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 9, 5 Cir., 1977, 551 F.2d 1026.)

Before GODBOLD, McCREE* and TJOFLAT, Circuit Judges.

PER CURIAM:

Ernst, McCauley and Providence have petitioned for a rehearing of numerous aspects of our original opinion in this case, 551 F.2d 1026 (CA5, 1977). We modify that opinion in the following regards.

1. Ernst challenges our agreement with the district court's calculation of damages due from Fairbanks for fraud in connection with its generator contract, 551 F.2d at 1035, asserting that it was shortchanged by $5,541, the amount that it would have charged Manhattan for installation had Fairbanks actually supplied the generator.

[1, 2] By requiring Fairbanks to compensate Ernst only for the amount Ernst paid to Manhattan to make Manhattan whole, we essentially returned Ernst to its position prior to the contract (except for its alleged delay damages, to be determined on remand). This was wrong. Damages awarded for breach of contract should return the party to the position he would have occupied had the contract not been violated. *Jewell v. Jackson & Whitsitt Cotton Co.*, 331 So.2d 623, 625-26 (Ala.1976). Ernst should therefore be entitled to the profit that it would have earned for installing the generator, not the full $5,541 that it would have charged Manhattan but the profit on the installation job. Of course, this recovery will be predicated on ability to show the amount with reasonable certainty. *Paris v. Buckner Feed Mill, Inc.*, 279 Ala. 148, 182 So.2d 880 (1966).

2. For the first time in this court, McCauley raises the statute of limitations as a bar to possible recovery by Ernst and Manhattan for its negligence in failing to rule on the acceptability of the generator and for its alleged negligence in drawing plans and in rejecting Palco bedlight fixtures. McCauley asserts that it pleaded this affirmative defense in the trial court. It cites no pleading to substantiate this assertion, and our search of the record reveals none. Rather than engage in any further search, we think it appropriate to include the entire statute of limitations question in the issues to be determined upon remand of Ernst's and Manhattan's negligence claims. Remand will also give these parties an opportunity to respond to the views first propounded here by McCauley concerning the dates of accrual and tolling of their various causes of action.

[3] 3. Providence correctly points out that the April 7, 1970, telephone call by Providence's attorney, threatening to sue Manhattan if it attempted to arbitrate the generator matter, was made to Alabama state officials and not, as we said at 551 F.2d 1040, to Manhattan itself. However, this does not affect our holding that Providence's extensive postsuit actions in all phases of this complex litigation served as a waiver of its right to demand that Manhattan arbitrate its grievances concerning the sewage ejection and bedlight fixture matters. When one party reveals a disinclination to resort to arbitration on any phase of suit involving all parties, those parties

* Hon. Wade H. McCree, Jr., of the Sixth Circuit, now Solicitor General of the United States, participated in the oral argument of this case, but did not participate in this decision.

are prejudiced by being forced to bear the expenses of a trial, which in this case was quite lengthy. Arbitration is designed to avoid this very expense. Substantially invoking the litigation machinery qualifies as the kind of prejudice to Manhattan that is the essence of waiver. *Burton-Dixie Corp. v. Timothy McCarthy Construction Co.*, 436 F.2d 405, 408–09 (CA5, 1971); *Cornell & Co. v. Barber & Ross Co.*, 123 U.S.App.D.C. 378, 360 F.2d 512 (1966). *See also Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329 (CA4, 1971); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (CA2, 1968).

[4] 4. Providence takes issue with our statement that it "has proven no damages other than delay" for Fairbanks' fraud in connection with the generator matter, 551 F.2d at 1042. The district court dismissed Providence's fraud claim prior to trial, and Providence points out it had no opportunity to prove fraud damages. But Providence was given an opportunity to have its fraud claim reinstated and considered during trial but elected not to avail itself of the offer.

In all other respects, the petitions are to be denied.

The petitions for rehearing are GRANTED in part and DENIED in part. No member of this panel nor judge in regular active service on the court having requested that the court be polled on the petition for rehearing en banc of Providence Hospital, the petition for rehearing en banc is DENIED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Susan N. Seaver
Deputy OCT 3 1977
New Orleans, Louisiana

E. C. ERNST, INC., Plaintiff,
v.
MANHATTAN CONSTRUCTION COMPANY OF TEXAS et al., Defendants,
v.
MANHATTAN CONSTRUCTION COMPANY OF TEXAS, Plaintiff by Counterclaim,
v.
E. C. ERNST, INC., et al., Defendants by Counterclaim.
Civ. A. No. 6340–70–T.

United States District Court,
S. D. Alabama, S. D.
Dec. 11, 1974.

An electrical subcontractor on a hospital building project brought an action against the hospital owner, architect, prime contractor and others seeking a declaratory judgment and order preventing the purchase and installation of any substitute equipment in place of an emergency generator which the subcontractor had proposed to install under its contract with the prime contractor. After final completion of the project, and after parties to the action had filed numerous cross claims and counterclaims, the suit developed into one for apportionment of responsibility for a construction overrun of 453 days. The District Court, Daniel Holcombe Thomas, J.,

entered numerous findings of fact and conclusions of law concerning responsibility for the overrun and damages payable as a result thereof.

Order accordingly.

1. Federal Civil Procedure ⇐1938

Even though hospital made no formal claim in its pleadings to recover liquidated damages from prime contractor and others involved in hospital construction contract, such damages were recoverable where issue of liquidated damages was framed by district court in its pretrial order. Fed.Rules Civ.Proc. rule 15(b), 28 U.S.C.A.

2. Contracts ⇐300(1)

Where prime contractor under hospital construction and renovation contract experienced delay in obtaining access to old operating room area of hospital because hospital was required to keep area in operation until it could occupy new operating area, hospital was required to extend construction deadline accordingly and prime contractor was not responsible for overrun resulting from lack of access.

3. Contracts ⇐300(3)

Where hospital and its architect caused delay of 131 days in installation of sewage system under hospital construction contract because of failure to decide promptly whether to use electric sewage ejection pump or gravity system, but some of such delay could have been absorbed by prime contractor during remainder of job, one-half of resulting contract overrun would be charged against hospital and subtracted from period for which it would be paid liquidated damages under construction contract.

4. Damages ⇐85

Where employees of electrical subcontractor under hospital construction contract knowingly installed explosion-proof receptacles in operating room of hospital in unacceptable manner and concealed their wrongdoing, subcontractor was liable to pay liquidated damages for 108-day project overrun caused by such actions.

5. Contracts ⇐301, 312(1)

Hospital and its architect breached hospital construction contract by failing in timely manner to accept bed light fixtures which were admittedly equivalent to those described in contract specifications, and each would therefore be held responsible for one-half of 59-day project overrun caused by resulting delay. Public Health Service Act, § 600 et seq., 42 U.S.C.A. § 291 et seq.

6. Contracts ⇐234

Where electrical subcontractor under hospital construction contract failed to provide emergency generator system which complied with contract specifications and such system was instead provided by prime contractor at its own cost, prime contractor was entitled to reduce amount due to subcontractor by entire amount which it cost to obtain and install emergency generator sytem.

7. Sales ⇐418(7)

Where company which was to supply emergency generator system through electrical subcontractor under hospital construction contract failed to supply system which met specifications of contract, and system was instead procured by prime contractor, subcontractor could recover from supplier difference between purchase price of system as incurred by prime contractor and refunded to it by subcontractor and price of supplier's proposed system, plus additional installation costs incurred by prime contractor and subcontractor.

8. Contracts ⇐301

Where architect under hospital construction contract prepared deficient plans and specifications for emergency generator to be installed in hospital and failed to act properly and promptly on proposal submitted for furnishing of that equipment, and where proposed supplier of generator unit concealed fact that unit did not meet specifications of contract, architect and supplier were each responsible for one-half of 161-day project overrun occasioned by resulting delay.

9. Fraud ⇐58(1)

Although proposed supplier of emergency hospital generator unit under hospital construction project engaged in fraudulent conduct in misrepresenting unit as complying with specifications of contract, evidence failed to establish that electrical subcontractor, which was responsible for obtaining unit, participated in such fraud.

10. Fraud ⇐13(1), 61

Proposed supplier of emergency hospital generator system under hospital construction contract was guilty of fraud in seeking to obtain approval of proposed units by means of flagrant and false representations, including representations that units met specifications of contract and false statements as to quality and performance capabilities of equipment, and supplier was therefore liable to pay punitive damages both to electrical subcontractor and prime contractor.

11. Contracts ⇐301

Prime contractor under hospital construction project was guilty of lack of proper management of project in several respects, including failure to provide additional manpower when requested to do so by architect and required by general conditions of construction contract, and failure to schedule work properly, and 60 days of a 453-day overrun on project would therefore be attributable to prime contractor's failure to properly supervise and coordinate work.

12. Principal and Agent ⇐159(1)

Architect is agent for owner in construction project, and owner is responsible for any damages caused by architect's deficiencies insofar as other parties are affected thereby.

13. Damages ⇐85

Where, although no contractual agreement existed between architect and owner concerning liquidated damages which might arise from delay of completion of hospital construction project attributable to fault of architect, architect itself had been instrumental in inclusion of $250 per day liquidated damage provision in construction contract, such rate of liquidated damages would be utilized in awarding damages to owner for delays in completion of project caused by architect.

14. Contracts ⇐290

Where hospital at no time sought to begin arbitration of disputes arising under hospital construction contract and in fact threatened to prevent arbitration by filing lawsuit, hospital's actions constituted waiver of arbitration provisions of contract, and litigation arising under contract would therefore not be dismissed for failure to arbitrate.

15. Federal Civil Procedure ⇐2737.5

Where all parties involved in dispute over responsibility for overrun in hospital construction contract were to some extent at fault, all parties had opportunity to settle action but chose to litigate, and each party defended only its own interests and asserted only its own claims and defenses, each party-litigant would bear its own attorneys fees and expenses.

16. Damages ⇐80(2)

Provision in hospital construction contract for payment by prime contractor to hospital of sum of $250 per day for each day that completion of project was delayed beyond date specified in contract was reasonable and binding upon hospital and prime contractor.

17. Damages ⇐85

Where hospital, either itself or through its architect, was chargeable with 163 days of 453-day overrun on project, it could not recover liquidated damages from prime contractor for such portion of overrun.

18. Contracts ⇐290

Litigant cannot fail to invoke permissive arbitration provisions of contract and then attempt to advance such failure as defense to claims asserted against it.

19. Limitation of Actions ⇐100(1)

Where more flagrant facets of fraud of proposed supplier of emergency generating equipment for hospital construction project were revealed in discovery within only months prior to commencement of hearing on litigation concerning parties' responsibility for delay in project, claims for punitive damages against supplier on grounds of such fraud were not barred by one-year statute of limitations.

20. Fraud ⇐61

When misrepresentation and fraud have been established by clear, cogent and convincing evidence, it is appropriate and proper for court to award not only actual damage caused thereby, but also punitive damages in appropriate amount.

Willis C. Darby, Jr., Mobile, Ala., for Providence Hospital.

Glower W. Jones, Smith, Currie & Hancock, Atlanta, Ga., Edward S. Sledge, III, Gallalee, Denniston & Edington, Mobile, Ala., Arthur Friedman, Tanner & Friedman, New York City, for E. C. Ernst, Inc.

David M. Thornton, Thornton & Stamper, Tulsa, Okl., for Manhattan Const. Co. of Texas.

Maurice Bishop, Bishop & Carlton, Clarence L. McDorman, Jr., London, Yancey, Clark & Allen, Birmingham, Ala., for Charles H. McCauley Associates, Inc.

Louis E. Braswell, Hand, Arendall, Bedsole, Greaves & Johnston, Mobile, Ala., for Fairbanks-Morse, Inc.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

DANIEL HOLCOMBE THOMAS, District Judge.

HISTORY OF CASE

1. This proceeding should serve for years to come as a classic example of the economic futility of litigation of this nature and the need for settlement of such controversies.

2. In 1967, Providence Hospital of Mobile (Providence), a Catholic hospital operated by the Sisters of Charity, decided to substantially expand its facilities and to renovate and remodel its existing buildings. Providence obtained a Hill-Burton Federal Grant in the amount of $1,000,000.00. On October 27, 1967, Providence entered into a standard form architectural contract with Charles H. McCauley Associates, Inc. (McCauley), a large architectural firm in Alabama with wide experience in hospital construction. Pursuant to this contract, McCauley prepared plans, specifications and contract documents. On April 12, 1968, McCauley advertised the job for bids to be received until July 18, 1968. Seven contractors submitted bids. On July 29, 1968, the contract was let by Providence to Manhattan Construction Company of Texas (Manhattan) for a total contract price of $6,117,500.00. Manhattan entered into a subcontract with E. C. Ernst, Inc. (Ernst) under which Ernst agreed to furnish the materials and equipment and perform all of the electrical work for a cost of $982,215.00.[1] Under this subcontract, Ernst was required to provide emergency generators which it later contracted to purchase from Fairbanks-Morse, Inc. (Fairbanks-Morse), a fifth party to this litigation.

3. The contract between Manhattan and Providence incorporated the plans and specifications prepared by McCauley and provided that Manhattan was required to complete the project within 730 days. If the project was not completed within this specified period and any granted extensions of time, Manhattan agreed to pay liquidated damages of $250.00 per day until completion. The subcontract between Manhattan and Ernst provided the same time schedule and liquidated damages plus an indemnification agreement from Ernst to Manhattan.

1. Ernst had also submitted bids to several of the general contractors bidding on the job, but submitted its lowest proposal to Manhattan.

4. The order to proceed was issued August 19, 1968. Therefore, the original completion date was August 18, 1970. During the period of construction, the time was extended by appropriate change orders for 185 days. Accordingly, the revised completion date was February 19, 1971. The job was accepted on May 17, 1972, making an overrun of 453 days.

5. This extended litigation was commenced on August 28, 1970, by Ernst filing a complaint against all other parties seeking a declaratory judgment and order "preventing the purchase and installation of any substitute equipment" in place of the Fairbanks-Morse emergency generator, with engines, which Ernst had proposed to install under its contract with Manhattan. The Court set the matter for hearing on January 27, 1971, on the sole issue of the sufficiency of the Fairbanks-Morse emergency generator system. Hearing on this issue was concluded on February 4, 1971, when this Court issued an order specifically finding that:

> "The emergency generator system (proposed to be furnished) does not meet the requirements of the specifications",

and that:

> "The Dorman engines proposed by Fairbanks-Morse to power the emergency generator system do not fulfill the horsepower requirements of the specifications.
>
> "The Court finds from the evidence that the material submitted to McCauley by Fairbanks-Morse, Ernst and Manhattan, or any one or more of them, failed to establish that the emergency generator system proposed to be supplied by Fairbanks-Morse, met the requirements of the specifications." [2]

6. This suit triggered a long pleading war with a series of amendments, cross-claims, counterclaims, and motions, bearing little resemblance to the original complaint and resulting in many issues between and among the parties.

7. On April 11, 1973, this matter was set down for pretrial, and the attorneys were instructed to have present at the pretrial, a representative of each litigant who had authority to negotiate settlement of this matter. Besides all attorneys being present, the litigants were represented as follows: Ernst, by a Vice President; Fairbanks-Morse, by a director; McCauley, by its liability carrier; Manhattan, by a Vice President; Providence, by its Administrator. At the commencement of the pretrial, the Court made the following statement:

> "Gentlemen, this is a case which should be settled between the parties. In present day thinking, it seems to be the idea that any problem can be cured in a Federal District Court. This, I assure you, is an erroneous approach. There is not a lawyer in this courtroom capable of operating the Providence Hospital. There is not a lawyer in this courtroom capable of running Manhattan Construction Company; there is not a lawyer in this room capable of running McCauley Associates; nor a lawyer in this room capable of running Fairbanks-Morse; nor a lawyer capable of running Ernst, and I assure you there is not a Judge in this courtroom capable of doing so. All of you litigants are successful operators or you would not be participating in a six million dollar contract. Lawyers in their zeal to represent their clients many times fail to see but one side of the litigation and that is the side of his client. This litigation is not a one-sided bit of litigation, it is a five-sided bit of litigation.
>
> I stated at the outset that this was a case that should be settled between the

2. The Court's Findings of Fact and Conclusions of Law on this generator feature are hereto attached and made a part hereof as Exhibit 1.

parties. I said that because this is a classic example where the cost of proper preparation of the case for trial is completely disproportionate to the benefits any of the parties could hope to derive. You'all are represented by capable attorneys. None of the attorneys want to go to trial in this case unless and until they have properly and thoroughly prepared their case for trial. This entails much pretrial discovery and pretrial discovery entails much lawyer time, much travel, much hotel expense. The point is, it is extremely expensive.

Not only does this continued litigation require discovery expenses, it entails expenses in the appellate court. This case is already no stranger to the Fifth Circuit nor the U. S. Supreme Court. Yes, litigation is expensive, but remember the courts do not create litigation, it is created by the litigants. I have asked that you representatives of the litigants be here today. Although I know you have been kept abreast of this litigation by your attorneys, I wanted you to hear directly from the trial judge his thoughts on this matter. You litigants are in a fairly closely related field. Being trained in this field, you are in a far better position to adjust your differences than those untrained in these related fields. As an illustration, I, who have had no training whatsoever in engineering, had to determine whether or not the emergency generator system proposed to be furnished by Fairbanks-Morse, met the specifications, when experts couldn't agree. That is a strange bit of logic.

If this case is not settled quickly, it is going to trial quickly, properly prepared or otherwise. To try this case will probably take not only days, but weeks, and I wish to state to all of you litigants and all attorneys here and now, if this case is not settled, it will be tried during the month of August, 1973, and it will take the precedence over vacations or any other business conflict.

The object of litigation is to do substantial justice between the parties litigant, but the parties litigant should realize that, in most situations, they are by their particular training better able to accomplish this among themselves.

This is your court, it is the peoples' court. It is properly staffed and ready, willing and able to try this case and will do so in August.

Regardless of the outcome, an appeal is almost certain. This will entail more expense and more delay.

Having thusly expressed myself, we will now proceed with the pretrial of this case. I will ask you representatives of the litigants to remain throughout this pretrial as your presence will most likely be helpful."

8. The case was not settled, and the trial was commenced on August 6, 1973. It entailed 40 days of court time, 41 witnesses (34 live and 7 by deposition) and 1056 exhibits. Presentation of the evidence was finally concluded on November 27, 1973. Thereafter, the litigants were given until the 28th day of January, 1974, within which to file Findings of Fact and Conclusions of Law. This time was extended to February 11, 1974. The Court after studying these Findings and Conclusions set the matter for final argument on May 22, 1974, each litigant being given one hour's time. The pretrial order entered in this case on the 26th day of April 1973, and amended on the 6th day of July 1973, is attached hereto and made a part of this Finding hereof as Exhibit 2. As stated above, portions of this case have already been before the Fifth Circuit and the Supreme Court. Docket numbers 72-3073 and 73-1287, Fifth Circuit and A-129, Supreme Court. Each contains a part of the history of this litigation.

9. PARTIES—The following parties are litigants in this action: Plaintiff, E. C. Ernst, Inc. (Ernst), is a corporation incorporated under the laws of the District of Columbia and has its principal place of business in the District of Columbia. Defendant Manhattan Construction Company of Texas (Manhattan) is a corporation incorporated under the laws of the State of Texas and has its principal place of business in the State of Texas. Defendant Fairbanks-Morse, Inc. (Fairbanks-Morse) is a corporation incorporated under the laws of the State of Delaware and has its principal place of business in the State of Wisconsin. Defendant Providence Hospital (Providence) is a corporation incorporated under the laws of the State of Alabama. Defendant Charles H. McCauley Associates, Inc. (McCauley) is a corporation incorporated under the laws of the State of Alabama and has its principal place of business in the State of Alabama.

10. DESIGNATION OF BUILDINGS—In the plans and specifications and in the testimony of witnesses, various portions of the construction project are referred to by separate building designations, although all of the work was inter-related and not separable into independent units. The project upon completion was a single integrated structure. The structure as it existed prior to commencement of the new construction or remodeling was referred to as the "existing building". The newly constructed six floor addition was referred to as "Building A" and consisted principally of patient rooms, operating suites, x-ray facilities and treatment rooms. A new single story addition with basement was added to the front of the existing building and was referred to as "Building B". It contained principally administrative spaces, entrance lobby, and records library (Tr. 2119).[3] The kitchen and cafeteria of the existing building were expanded by another one story addition referred to as "Building C". (PX 14A)

11. CLAIMS—The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000.00). The following claims are asserted by the different parties:

A. ERNST AGAINST MANHATTAN—Ernst seeks damages against Manhattan for delays and disruptions caused by Manhattan's breach of its obligations to do the following: To provide accurate plans, drawings and specifications for the project; to complete all preliminary work necessary in order to allow Ernst to perform its work; to coordinate the work of and among the various subcontractors; to make or obtain prompt decisions on all questions requiring an answer from the owner, architect or general contractor; to supply promptly information required from the owner, architect or general contractor; to act promptly and dispositively, or to procure others to so act, upon all requests for approval of material and equipment; to make available to Ernst in timely fashion the specific areas necessary for the performance of each part of Ernst's work; to coordinate the work performed by Manhattan and other subcontractors so as to prevent any interference with the timely performance of Ernst's work; to promptly make, issue or procure understandable and feasible clarifications of specifications, drawings or plans, and to issue promptly any directions necessitated thereby; and to do all things necessary to be done in order to complete, or to permit the completion of, the project within the time frame specified therefor. In addition to the above, Ernst claims a balance of $6,252.60 due from Manhattan under the contract. Finally, Ernst asserts that a novation was agreed to among Manhattan and Tube-O-Matic, Inc., one of Manhattan's subcontractors, whereby Manhattan was directed in writing to pay Ernst a sum of money on account of work done by Ernst in fulfillment of Tube-O-Matic's obligations on the project.

B. ERNST AGAINST FAIRBANKS-MORSE—Ernst claims damages against Fairbanks-Morse for breach of its obligations under their contract for the procurement of an acceptable emergency generator system. Manhattan has

3. The following abbreviations are used throughout this opinion: Tr., Transcript of Trial; EX, Ernst Exhibit; PX, Providence Exhibit; McX, McCauley Exhibit; MX, Manhattan Exhibit and FX, Fairbanks-Morse Exhibit.

withheld from Ernst funds due it totalling $143,293.65 on account of claimed costs to Manhattan in furnishing, in lieu of the Fairbanks-Morse system, an emergency generator system which complied with the plans and specifications. Ernst therefore claims damages in an amount, plus interest, equal to all or any portion of such back charges which are sustained as proper by this court and which are in excess of $83,740.00, such latter sum being the contract price to Ernst for the Fairbanks-Morse system. If all back charges are sustained, then the damages sought by Ernst hereunder would be $59,553.65 plus interest. Ernst also seeks general damages for any losses it has sustained which are attributable to delays or disruptions caused by Fairbanks-Morse's attempt to supply and have accepted its non-complying emergency generator system. In addition, Ernst claims that Fairbanks-Morse is obligated pursuant to their contract to indemnify Ernst against any losses for which Ernst is held liable and which resulted from Fairbanks-Morse's failure to furnish timely a complying emergency generator, said indemnification to include all of Ernst's legal fees and expenses in this action. Finally, Ernst claims punitive and compensatory damages against Fairbanks-Morse for wilfully and knowingly making fraudulent misrepresentations to Ernst relating to its generator's compliance with all specifications of the Contract Document and Ernst's own purchase order, Ernst having relied upon such misrepresentation. Ernst asserts that such misrepresentations regarded, among other matters, horsepower ratings and merchantability, the latter despite the used, failed, rebuilt and cannibalized condition of the generators supplied by Fairbanks-Morse.

C. ERNST AGAINST PROVIDENCE—As a third-party beneficiary of the contract between Providence and Manhattan, Ernst claims damages against Providence for delays and costs of court caused by Providence's breach of its contract to do the following: to supply plans, drawings and specifications for the project which correctly and completely depicted the work to be performed and which were feasible for the accomplishment of the work; to promptly supply such information as was required from it in the course of the performance of the work; to promptly issue such clarifications as were required from it in the course of the performance of the work; to act promptly upon necessary approvals of material or equipment to be used in the course of performance of the work; and to promptly do all things required in order to enable all persons, including Ernst, timely and in an orderly manner to perform their obligations under their contracts and subcontracts within the time frame specified therein.

D. ERNST AGAINST McCAULEY—As a contractee with McCauley in connection with the procurement of the plans and specifications, Ernst claims damages against McCauley for breach of its warranty that the plans and specifications were in all respects accurate, complete and sufficient so as to allow proper evaluation of work to be done under the contract. Ernst asserts that McCauley's breach of its warranty caused delays and disruptions in the supply of equipment and materials and ultimately in the completion of the project. As third-party beneficiary of the contract between Providence and McCauley, Ernst claims damages against McCauley for failure to provide plans and specifications suitable for determining the scope and cost of work to be performed and for feasible construction; for failure to timely effect necessary clarifications, corrections and changes in the plans and specifications; and for failure to promptly act upon submittals of data, samples and the like which were required to be submitted to the architect.

E. MANHATTAN AGAINST PROVIDENCE—Manhattan initially claimed that a balance of $334,473.79 was due it under its contract with Providence. On July 27, 1973, the Court ordered Providence to make a payment of $211,475.00, thus reducing the balance due to $123,000.00. In addition, Manhattan claims damages against Providence for intentional interference with Manhattan's timely performance of the contract by failing to deliver portions of the "existing building" for renovation and by employing incompetent agents and representatives. Manhattan claims further damages for improper processing of submittals, improper handling of the patient bed light fixtures selection and installation, and improper handling of the emergency generator selection and installation.

F. MANHATTAN AGAINST McCAULEY—Manhattan seeks damages against McCauley for failure to perform general contractual duties, for failure to properly process submittals, for failure to handle properly the bed light fixtures selection and installation and for failure to handle properly the emergency generator selection and installation.

G. MANHATTAN AGAINST ERNST—Manhattan seeks indemnification from Ernst as to any liquidated damages for which Manhattan is deemed liable to Providence and for recoveries against Manhattan by any cross-claimant or plaintiff. Manhattan also seeks damages based on contract and fraud theories relating to the furnishing of the patient bed light fixtures, the explosion-proof receptacles, the wiring and the emergency generator. Manhattan alleges that Ernst and Fairbanks-Morse, jointly and independently beginning in October 1968, represented to Manhattan that the Fairbanks-Morse generator system met the required specifications, that said representations were made knowing them to be false and that Manhattan relied on the misrepresentations to its detriment. Manhattan alleges a conspiracy to defraud it by Ernst and Fairbanks-Morse and seeks punitive damages against Ernst for its fraud.

H. MANHATTAN AGAINST FAIRBANKS-MORSE — Manhattan seeks damages against Fairbanks-Morse based on contract and fraud theories relating to the furnishing of the emergency generator. Manhattan also seeks punitive damages against Fairbanks-Morse.

[1] I. CLAIMS BY PROVIDENCE—Providence has no formal claim for liquidated damages. However, this issue was framed by the Court in its pretrial order. Rule 15(b) provides that, "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Providence has also pleaded over against McCauley for indemnification as to any liability Providence might have on the various claims asserted by Manhattan against Providence.

12. McCauley and Fairbanks-Morse make no claims against any of the other litigants. Their sole position being defensive.

13. The pleadings as framed are more the product of fertile legal minds that they are definitive of the real issues involved in the law suit. Every conceivable issue was raised even though many would have no effect on the outcome of the case. The real issues are:

a. What was the actual number of days of overrun for which liquidated damages are to be assessed, and who was responsible therefor?

b. Did the question of whether or not to use a sewage ejector pump or a gravity system cause any delay in the completion of the entire contract?

c. Did the installation of the explosive proof receptacles in the new operating rooms cause any delay in the ultimate completion of the job?

d. Did the decision as to what patient room light fixtures would be used cause any delay in the ultimate completion of the job?

e. Did the problems in selection and installation of the emergency generator system cause any delay in ultimate completion of the job?

f. Did Ernst's activities during the selection and installation of the emergency generator constitute fraud?

g. Was Fairbanks-Morse guilty of fraud in regards to the emergency generator system?

h. Did the method in which the hospital released space in the old building to Manhattan cause any delay in the ultimate completion of the job?

i. Did Manhattan fail in its duty to supervise and coordinate the work, and, if so, did it delay the ultimate completion of the job?

j. Is Providence entitled to a judgment over against McCauley?

FINDINGS OF FACT

The Issue of Liquidated Damages

14. The claim of Providence, raised *sua sponte* by the Court, for liquidated damages under its construction contract creates several factual issues, primary of which is the period of time for which these damages should be applied. This question is resolved by determining the number of days for which extensions were granted or should have been granted beyond the scheduled completion date of August 18, 1970. The number of days for which extensions were approved, or should have been approved, should be subtracted from the 638 days between August 18, 1970, and May 17, 1972, when the project was conditionally accepted. Another question relates to the extent, if any, that Providence may have been responsible for delays which caused the project to extend beyond its scheduled completion date.

[2] 15. There was a dispute with respect to a request by Manhattan for an extension of time for 39 days. Manhattan contended that it experienced that much delay in obtaining access to the old operating room area, which had necessarily been kept in operation until occupancy of the new operating area. (EX–492, 493) By letter of April 27, 1972, McCauley had recommended approval of the request to Providence. (EX–493) On April 28, 1973, Providence first denied the request (EX–494), but then, by letter of May 10, 1972, it advised that it would grant the extension of 39 calendar days. (EX–495) On May 18, 1972, Providence changed its position and directed McCauley to disregard its approval letter of May 10, 1972, and to deny the requested extension (EX–494) The Court finds that the extension requested should have been, and was, approved by Providence and therefore allows it in the computation herein.

16. Additional extensions of time were requested and denied. These requests were properly denied and will be considered in connection with the discussion of the portion of the work to which they were related. The extensions properly granted and due to be deducted from the 638 total days overrun comprise 185 days which total includes the disputed 39 days discussed above and extensions granted in connection with Change Orders 1–12, inclusive. There should also be deducted 65 days for which Providence was responsible in regard to the sewage ejector pump and 29½ days in regard to the bed light fixtures, as are hereinafter discussed. In addition, for the purpose of computing liquidated damages, there must be deducted from the total overrun the delays caused by McCauley, it being Providence's agent, which were 29½ days in regard to the bed light fixtures and 80½ days in regard to the emergency generator, also hereinafter discussed. Accordingly, the overrun for which liquidated damages are due is 248½ days for a total of $62,125.00 in damages, the contract providing for liquidated damages of $250.00 per day.

17. The more difficult determination confronting this Court is how the blame for this overrun should be assessed among the parties and what effect this will have on the right of Providence to recover the liquidated damages sought. From the foundation to the finish work there were multiple difficulties, many of which should have been anticipated in a job of this magnitude involving new construction and the remodeling of hospital facilities where sick patients had to be treated, operations performed, and hospital functions continued without interruption.

18. In summary form, to be further detailed in connection with the more specific issues to follow, the progress was substantially as follows: In 1968 and early 1969, foundations for the additions to the existing hospital (Buildings A and B) were being laid. Inclement weather and the necessity for some unexpected work on the pilings on which the foundation would rest (for which all extensions requested were granted) put the project behind schedule. Manhattan prepared a bar chart showing anticipated commencement and completion dates for cataloged portions of the job, but admittedly abandoned the chart during the early parts of the project. There is testimony that there was a period of progress during the time that Building A was being raised to its full six stories, but there were difficulties regarding certain materials and equipment to be installed, specifically the emergency generator system, bed light fixtures, and deficiencies discovered in the explosion-proof receptacles. Delays involving these items will be discussed in more detail. In 1970 work continued on the new building. Building B was completed in November 1970, and the renovation work begun in the non-patient areas of the existing building. By Janury 1971, Building A had reached a point in its construction where it could have promptly been made ready for patient occupancy if the emergency generators had been available. Apparently, Manhattan and its subcontractors did not push to complete the building during the winter of 1970–1971. After the emergency generator arrived and was installed, Building A was occupied by patients from the existing building, and portions of the existing building were turned over from time to time, by Providence to Manhattan for renovation.

19. On May 3, 1971, it was discovered that the explosion-proof receptacles (FX–115, p. 328) which were required in the new operating rooms in Building A had been defectively and dangerously installed, thereby delaying occupancy until the defects could be corrected. This meant that Providence had to continue to use the operating rooms in the existing building which to some extent disrupted Manhattan's renovation of the existing building. There were further problems with the emergency generator, but the work continued through May 1972, in connection with renovations in the existing building.

20. The various witnesses at the trial attempted to allocate periods of delay which prolonged the ultimate completion of the project. However, the Court finds it impossible to affix periods of delay with any degree of accuracy, except with respect to the emergency generator, the explosion-proof receptacles and the bedlight fixtures. There is some evidence that Providence delayed completion of the project through a lack of coordination in turning over parts of the existing building to Manhattan. There is other evidence that Providence was conscientious in providing access to the existing building but necessarily was at times delayed in view of the recognized commitment to keep the hospital operational. It is apparent that Manhattan and Ernst underestimated the difficulties inherent in this renovation under the contract conditions.

21. Representatives of the various parties attempted to assess the responsibility for delay on others than themselves. Every witness testified that there was some overlap with respect to the delays experienced and the cause therefor. They further testified that the delays were due to various causes, as to a portion of which some defendants admittedly could not be held responsible.

Sewage Ejection Pump

[3] 22. The plans and specifications for the project provided for the sewage outflow line serving the hospit ' to be placed underground beneath the

floor of the Building B addition. An electric sewage ejection pump was to be installed for the purpose of lifting or pumping the sewage up to the level at which it could be discharged into the municipal sewer lines. By November 1968, Manhattan had completed the excavation for the basement of Building B (an area approximately two hundred feet by fifty feet by ten feet deep) and the reinforcing steel for the pilings and had in place the pile caps, the walls and the underground piping. Manhattan was now ready to pour the basement floor. At this time, McCauley directed that the pouring be held up. The building engineer for Providence had belatedly realized that, by running the sewage line through the basement rather than under the floor, the sewage could be made to flow out of the hospital by gravity and that the need for the ejection pump could be eliminated along with its resulting cost and operating and maintenance expense. (PX 3, Tr. 2116–2123)

23. On November 14, 1968, Manhattan was requested by McCauley to propose a change in the contract price for eliminating the pump and changing the sewage line to a gravity flow system. Had the gravity flow arrangement been originally designed by McCauley, it would have been less expensive than the underground pipe and pump system. However, the work had progressed so far at the time the change was proposed that it would then have cost more to change the design to a gravity-flow line than it would have cost to proceed with installation of the pump. Manhattan and its plumbing subcontractor submitted to McCauley a proposal for the change on December 11, 1968. That proposal was disapproved for the reason that it did not coincide with an estimate made by one of McCauley's consulting engineers. The proposal was resubmitted on February 21, 1969. Manhattan was notified on March 25, 1969, that the proposal was rejected. Manhattan was then permitted to resume its work and to install the pump as originally designed. (MX 244, Tr. 2116–2123)

24. Installation of the sewage ejection pump system was stopped on November 14, 1968, and resumed again on March 25, 1969. Thus, there was a delay of some 131 days in the installation of the sewage system. Manhattan requested an extension on its contract of 131 days because of this delay, but its request was denied by the architect. At trial, Manhattan insisted that it was entitled to this extension. Fairbanks-Morse joined Manhattan in this position. Ernst also insisted at trial that it was entitled to an extension of 131 days with the delay being attributed to Providence and McCauley. Both McCauley and Providence argued that the extension was properly denied.

25. It is true that there was a delay of 131 days in the installation of the sewage system and that this particular delay resulted from the failure of Providence and McCauley to decide promptly which sewage system would be used. However, the Court does not find that this delay caused a corresponding delay of 131 days in the completion of the project as a whole. According to his testimony (EX 244), Manhattan's own Vice President, Mr. Roberts, originally had felt that this 131 days could have been absorbed within the contract's time limit for the job. Although Mr. Roberts later changed his mind, the Court shares his original thoughts to the extent that with proper supervision and coordination by Manhattan and McCauley, this entire time could have been absorbed. However, the fact is that it was not absorbed. Providence is the one who originally came up with the idea of the gravity system, and this caused the stoppage of this phase of the work. While it is impossible to determine to a certainty the number of days delay which this problem caused in the ultimate completion of the job, suffice it to say that such delay, as there was, was caused by Providence. The Court feels therefore that one-half of this 131 days is as accurate an estimate as can be made of the actual resulting delay, that 65 days of delay should be charged against Providence and that Providence should not be paid liquidated damages for that period.

Explosion-Proof Receptacles

[4] 26. The specifications provided, in part:

"*Receptacles*:

"Explosion-proof receptacles in operating rooms and hazardous area shall be flush mounted, 125 volt, 20 amps, 3 pole (grounding) with armored cord grip plug for each receptacle, polished chrome finish, Hubbell No. 24309 and No. 24312 cap." (PX 3, pg. 18–26; Tr. 499)

"*Type of Installation*:

"(c) All work installed in Operating, Delivery and Emergency Rooms and areas containing combustible anesthetics shall be in accordance with requirements of the National Electric Code for Class I Group C installation of all equipment within five feet of the floor. Other equipment in areas shall comply with N.F.D.A. No. 56." (PX 3, p. 18–6; Tr. 499)

"*Standards of Materials and Workmanship*:

"All materials shall be new and shall be listed as approved by the Underwriters' Laboratories, Inc., in every case where a standard has been established for the particular type of material in question. All work shall be executed in a workmanlike manner and shall present a neat and mechanical appearance when completed." (PX 3, pg. 18–3)

27. An explosive-proof receptacle, of the type involved in this litigation, is a device consisting of three principal parts. The largest part is a heavy cast-steel, cube-shaped box fitted with screw-out plugs for attachment to electrical conduits at various points. The box is hollow, and one side has a threaded opening three inches in diameter. Into this threaded opening is screwed a cast-steel collar, the threaded portion of which is approximately 1⅛ inches long. On the outer end of the collar is a flange plate 4⅛ inches in diameter and ¼ inch thick. The outer face is machined perfectly flat, and it has four threaded holes for the attachment of the third part. The third part of the device has a heavy cast-steel face plate, the outer face of which is chrome plated and the inner face is machined so as to seal against the face of the flange on the collar. On the inner side of the face plate is a sealed can-type unit containing the electrical contact portion of the receptacle. When assembled, four screws pass through holes in the face plate and into the holes in the collar flange, making an airtight seal between the machined faces of each. The face plate contains the female portion of the receptacle, into which a specially-designed male plug may be inserted. (EX 706; EX 511)

28. The codes referred to in the specifications quoted above require the use of explosion-proof receptacles for all installations in operating rooms and similar areas below the level of five feet above the floor in order to eliminate the risks of explosion and fire. Gases used for anesthesia are highly flammable and explosive. Operating rooms where these gases are used are kept under positive air pressure to minimize the possibility of entry of contaminants. Ventilating air is introduced at points high in the room and exhausted near the floor, so that any explosive gas leaking in the room would be drawn downward and exhausted. The area below five feet above the floor is considered hazardous because any explosive gas which escaped would be drawn downward. The explosive-proof receptacle is so designed and constructed so that when properly installed, if any explosive gas is forced into the wall cavity and into the receptacle by the pressure in the operating room and there ignited by a spark from the receptacle, the force of a resulting explosion would be contained within the

device. Fire or hot gases would therefore not be permitted to escape and cause a larger explosion inside the operating room. (Tr. 500–2)

29. For a proper and safe installation in a wall, the cited codes require that at least five full turns, or threads, of the collar must be engaged in the threads of the box and that the machined faces of the collar flange and the face plate must be tightly drawn together with not more than .00015 inch clearance between them. If either of these requirements is not complied with, fire and hot gases could escape from the device in the event of an explosion inside of it. (Tr. 501)

30. As the walls in which the explosion-proof receptacles were to be installed were constructed, it was the responsibility of the electricians employed by Ernst to insure that the electrical conduit and the box portion of the device were properly positioned. This was necessary so that the face plate portion could be installed flush with the outer surface of the wall while obtaining the necessary engagement of the collar at least five full threads into the box and the seal between the face plate and the collar flange. (Tr. 910, 913, 3442) When the electricians installed the face plates, they knew whether or nor they had the proper seal and thread engagement. (Tr. 893, 913, 971)

31. On May 3, 1971, Mr. Lacefield, McCauley's electrical consultant for this project, made an inspection of the electrical work at the project, including the operating rooms in Building A. (Tr. 506–7) At that time, the explosion-proof receptacles had been installed by Ernst. To all outward appearances, the receptacles had been properly installed. The face plates were in place against the walls. (Tr. 510) However, the receptacles had actually been improperly installed by Ernst. On many of the devices, the collars were not engaged five threads into the boxes, and the machined faces of the collar flanges were not in contact with the machined faces of the face plates. (Tr. 510, 894, 974, 978) It was necessary to remove the face plates in order to discover the improper installations and the hazardous condition thereby created. (Tr. 510, 974)

32. The Ernst electricians, who knew that they had installed the receptacles in an improper manner and thereby created the potential for a disastrous explosion in an operating room, had nevertheless concealed the hazard by procuring screws longer than those provided for attachment of the face plates to the collar flanges. These long screws were extended through the holes in the face plates, making it possible to secure the face plates to the wall without the machined surfaces of the face plates and the collars being in contact. (Tr. 1801–4, 1810, 1817) Mr. Johnson, a Vice President of Ernst, admitted that Ernst's installation and concealment of the defects had been improper. (Tr. 974, 978)

33. After discovery of the condition created by Ernst, it was necessary to find some method of correcting the defects and providing a safe installation. It was decided that this could best be done by obtaining collars having a longer threaded portion, which could be screwed five or more turns into the boxes and still meet the face plates with an airtight seal. These had to be ordered from the manufacturer and specially fabricated. This process and required testing by the Underwriters' Laboratories, Inc. required over three months. (Tr. 944–5, 948) Ernst acknowledged its responsibility for the installation of the receptacles by ordering and paying for the special long collars without asking for repayment by Manhattan or any other party. (Tr. 947–8, 956–7; EX 709)

34. By October 6, 1971, the longer collars had been delivered and installed. On that date, Mr. Lacefield made an inspection of the operating rooms and found most of the explosion-proof receptacles to be acceptably installed. Three or them were still not proper, however, and one had been pounded on the face plate in an effort to drive it into the wall far enough to fit. (Tr. 508–9; McX 84, pgs. 174–5) These installations were subsequently corrected. (Tr. 512)

35. With the exception of the explosion-proof receptacles, the operating rooms in Building A were complete and ready for use on July 1, 1971, when the remainder of the building was accepted and occupied. (Tr. 269, 2288) The operating rooms could not be used until proper and approved installation of the receptacles had been made. Providence was finally able to move into the new rooms on October 15 and 16, 1971. The first surgeries were performed in Building A on October 17 or 18, 1971. (Tr. 257, 270)

36. Since use of the operating rooms in the existing building had to be continued until the operating rooms in Building A could be used, the scheduled renovation of the areas of the existing building occupied by the surgical rooms, recovery rooms, labor and delivery rooms and the nursery were delayed as the direct result of Ernst's improper installation and concealment of the explosion-proof receptacles. This delay was for a period of 108 days, i. e. July 1 to October 16, 1971. (Tr. 269–73, 2152–5, 2288–90, 2311, 2670, 4423, 2601)

37. Ernst contended that the improper installation of the explosion-proof receptacles was caused by Manhattan's failure to build the walls in accordance with the plans and specifications. No convincing evidence of defective construction was presented. In any event, the matter became a problem and caused delay in the completion of the project only because Ernst's employees knowingly installed the receptacles in an unacceptable manner and concealed their wrongdoing with the long screws. The responsibility for the delay is solely that of Ernst, and it contributed 108 days to the total overrun on the project as a whole.

Bed Light Fixtures

[5] 38. The plans and specifications for the project required that each of the patient bedrooms in Building A would have installed in them a wall-mounted lighting fixture. The fixture consisted of a fluorescent lighting feature and a console which contained outlet connections for oxygen, nitrogen, vacuum, telephone and electricity. An integral part of the fixture was a back box, which was recessed and mounted into the wall at the time the wall was constructed. The required connections to electrical conduits and plumbing piping were made into the back box, which was concealed by a front, or exterior portion of the fixture when installation was completed.

39. The bedlight fixtures were required to have two lamps, or bulbs, one of which would shine primarily downward, providing a reading light for the patient, as well as some indirect illumination of the room. The other lamp would shine primarily upward for indirect room illumination. This lamp would be controllable by a switch convenient to the patient and by a switch near the entrance to the room. In order to have this two-point switching capability, it was required that the fixture contain two lamp ballasts. (Tr. 462) It was also required that the fixture be of brushed aluminum with an anodized finish and that it have rounded edges. (Tr. 463)

40. The patient rooms in the existing building were equipped with fixtures manufactured by the Sunbeam Lighting Fixture Company and designated as "Centron 10". In the planning stages of the project, the employees of Providence had decided that they desired that the patient rooms in the new addition be furnished with fixtures designated as "Centron 5", a fixture also manufactured by Sunbeam, but having all of the desired features. The specifications for the project were written to describe the Centron 5 fixtures which Providence wanted installed. (Tr. 477, 479, 816, 519) The lighting fixture schedule said that they were to be Centron 5 fixtures (further described by the catalog numbers from the Sunbeam catalog) or an

"approved equal". (PX 3, pg. E–30, Tr. 453) At the time he prepared the specifications, Mr. Lacefield, the consulting electrical engineer employed by McCauley, was not aware of any fixture manufacturer, other than Sunbeam, who produced a fixture which would comply with the requirements of the specifications. (Tr. 529–30, 532) He had determined that the Centron 5 would comply. (Tr. 525–6)

41. This project being partially financed by a Hill-Burton Grant required that the funding of the monies be supervised by the Bureau of Health Facilities Construction of the Alabama State Health Department. (Tr. 611)

42. Regulations of the Department of Health, Education and Welfare (HEW) and the State Health Department applicable to projects receiving Federal funding under the Hill-Burton Act required very strictly that free and competitive bidding be permitted and encouraged for all work and materials being supplied. These regulations were distributed to all architects and others involved in hospital construction matters. (Tr. 612, 616) [4] Each section of the specifications contained the required wording, set out in footnote 1, in the form of a paragraph of very small print in the upper right corner of the first page. It appeared at the beginning of Section 18 covering the electrical work. (PX 3, pg. 18–1)

43. The plans and specifications and the instructions to bidders on the project, which were distributed to prospective bidders in June, 1968, contained a requirement that any bidder who proposed to use an article different from the one designated by name in the specifications was required to obtain the architect's approval for such substitution not less than ten days prior to the bid date. The State Health Department deemed this provision to contravene the requirements for competitive bidding and directed that it be withdrawn. This was done by McCauley by an addendum issued shortly before the bid date. (Tr. 618)

44. The architect's specifications, to the extent that they named only one manufacturer and one model—Sunbeam Centron-5—made by that manufacturer, were in violation of HEW and Hill-Burton regulations for a project of this kind.

45. Ernst, whose responsibility it was under the electrical subcontract to supply all of the light fixtures, including the patient bed lights, had estimated in preparing its bid to Manhattan that the fixtures would cost $141,910.00 and that, because of its buying practice, it could reduce that cost by $35,377.00 in actually making the purchase. (Tr. 844) Ernst entered into a purchase order contract with Moore-Handley, Inc., a supplier, to furnish the required fixtures. The purchase order did not designate manufacturers or models but merely incorporated the requirements of the plans and specifications. It put the burden on Moore-Handley to furnish the fixtures which would comply with the requirements and satisfy McCauley and Providence. (MX 171; EX 699; Tr. 846–7) Moore-Handley proposed to furnish bed light fixtures called "Versalux" manufactured by Pacific Associated Company (Palco) as equal to the Centron-5. Moore-Handley prepared material concerning all of the light fixtures for submission to McCauley for approval. The submittal included shop drawings showing details of the proposed fixtures. In accordance with the contractual relationships, Moore-Handley forwarded the material to Ernst, who forwarded it to Manhattan, who forwarded it to McCauley, who submitted it to Lacefield.

46. By letter of October 4, 1968, McCauley asked that samples be furnished of all light fixtures that Ernest proposed to furnish, so it could be determined that Providence would get what it wanted. This request was forwarded to Ernst, to Moore-Handley and to Associated Manufacturers Agents, the representative of the fixture manufacturer. (PX 16; Tr. 747–8)

47. There was a substantial interval of time between the initial submission of Palco for approval and the ultimate acceptance of Palco for installation on the job. In this interval, which ran from approximately January 1969 through April 1970, submissions were made to the architect and returned as rejected for "reasons noted", but with no reasons noted. Although no sample was submitted with the first submissions on January 19, 1969, when a sample was submitted at McCauley's offices in Birmingham in October 1969, McCauley refused to look at it. At this point in time, because of the desire of Providence or McCauley that Sunbeam Manufacturers fixtures only be supplied, it was concluded that this equipment would be removed from the existing contract and Sunbeam fixtures procured independently by Providence. Subsequently, after further delay and in the intercession of the Alabama State Department of Health, Palco fixtures, which were at all times the functional equivalent of the Sunbeam and of equal quality, were designated and approved for installation and were actually installed.

48. Providence and McCauley should have accepted and approved the Palco fixtures in January 1969, when the first submittal was made, rather than 14 months later in March 1970, since it was unquestionably "equal" to the specified Sunbeam Centron-5 unit. The failure to do so was the result of Providence's decision in advance of the submission of bids on the project that it wanted nothing but the Centron-5 fixtures installed, as discussed above. Conclusive evidence of this decision and of the lack of good faith on the part of Providence and McCauley in their repeated disapproval of the Palco Fixtures is found in several facts. Prior to the bidding on the project, a request for approval of the Palco fixtures was made to McCauley pursuant to the requirements for pre-bid approval of alternate products, which requirement was subsequently deleted from the specifications. See Finding 43, supra. McCauley and Providence made no response to that request for approval and did not inform the prospective supplier that a decision had been made to accept only Centron-5 fixtures. (Tr. 577) Subsequently, McCauley refused even to look at a sample of the Palco fixture delivered to its offices. (Tr. 775) Each of the submittals on the Palco fixtures was marked "disapproved for reasons noted", but no reasons were given. (Tr. 744, McX 88, pg. 22; McX 73, pg. 152; Tr. 745; McX 88, pg. 42; Tr. 484) During the time that Providence and McCauley were engaging in the unwarranted and unexplained objections to the Palco fixtures, McCauley approved the purchase and use of plumbing connections for the back boxes of the patient bed light fixtures which would only fit the Centron-5 units, and not the Palco fixtures. (EX 782; Tr. 1998–9; Tr. 1985–92) During the same period, McCauley was stating that Providence intended to procure the fixtures itself.

49. Providence's and McCauley's handling of the selection of the bed light fixtures caused a delay in the completion of the overall project. Due to that delay, Manhattan requested a 59 day extension of the completion date. Providence refused the extension. The Court, however, finds that the requested extension was justified and mandated by the acts of Providence and McCauley. Therefore, for purposes of calculating liquidated damages due Providence, this 59 day extension is treated as if it had been granted. In addition, the Court finds that McCauley's mishandling of

4. These regulations require, *inter alia*: "The following paragraph shall appear at the beginning of each division or section of the specifications: Notwithstanding any reference in the specifications to any article, device or product, material fixture, form or type of construction by name, make or catalog number, such references shall be interpreted as establishing a standard of quality and shall not be construed as limiting competition; and the contractor in such cases may, at his option use any article, device, product, material, fixture, form or type of construction which in the judgment of the architect, expressed in writing, is equal to that specified." (EX 5, pg. 6, Tr. 612-3)

the selection caused 50% of this delay and that, therefore, McCauley was responsible for 29½ days delay in the project as a whole.

The Emergency Generators

A. IN GENERAL

50. The plans and specifications for the project required the furnishing of an emergency generator system, including two diesel-driven generators, to provide a standby source of electrical power for the hospital in the event of a failure of the regular supply from the utility company. The specifications for the system were extremely detailed and lengthy. All of the general specifications and the regulations under the Hill-Burton Act were also applicable to the emergency generator system, as were State Health Board Regulations.

51. Certain pertinent requirements of the specfications regarding the emergency generator system were: (a) All components must be of American manufacturer. (b) All components must be standard products of a manufacturer of the generator units for at least two years. (c) The units must be of proven reliability. (d) The generator must produce 600W in continuous operation and have a ten percent overload capacity for two hours. (e) The engines powering the generators must produce a minimum of 950 horsepower at 1800 RPM under specifically stated conditions of operation with all auxiliary equipment attached and working. (f) All components must be new and of best quality.

52. It was the obligation of Ernst under its subcontract with Manhattan to furnish and install the emergency generator system in compliance with the plans and specifications for the project. (EX 12) As noted above, on February 4, 1971, following a prior hearing in this action, the Court made and entered Findings of Fact adjudging that the emergency generator system which Ernst and Fairbanks-Morse proposed to furnish and install in the project did not comply with the requirements of the specifications. See Exhibit 1 hereto attached. Those findings are supported and reinforced by the evidence adduced at this trial.

53. Prior to the submission to Manhattan of its bid for the electrical work in the project, Ernst solicited price quotations on emergency generator systems from many suppliers. (MX 31) Among those submitted was Fairbanks-Morse's which quoted a price of $83,740.00 for its system including two Fairbanks model 600 TCW 12 generators which units were the ones ultimately proposed by Ernst for installation. (MX 33; Tr. 1008)

54. On June 25, 1968, Fairbanks-Morse wrote to McCauley requesting approval of Model 600 TCW 12 units for use in the project. Enclosed with that letter was a Fairbanks-Morse brochure of technical data on the units showing, *inter alia*, brake horsepower of 935 at 1800 RPM. (MX 33) The specifications required "not less than 950 at 1800 RPM." By memorandum of June 26, 1968, Lacefield noted, "O.K. provided they meet requirements of plans & specs". (MX 33) By letter on July 5, 1968, McCauley told Fairbanks-Morse that the units were approved provided the requirements of the plans and specifications were met. (MX 36)

55. During August of 1969, at the time construction was just commencing on the project, an employee of the Caterpillar distributor in Mobile, wrote Lacefield telling him that the generators units proposed by Fairbanks-Morse were powered by imported Dorman engines and did not comply with the specifications. (Tr. 2879–2884; Tr. 2965–9)

56. On August 27, 1968, Ernst entered into a purchase order contract with Fairbanks-Morse to supply the two engine generator units and all other components of the system for a total delivered price of $83,740.00. This contract did not designate any make, model or manufacturer of the generator units, but rather, merely recited the requirements for the various components from

the specifications. Ernst, by drafting of its purchase order, put the burden on its supplier to provide equipment which would be approved as satisfying the requirements of the specifications. (Tr. 1105)

57. On October 18, 1969, the first submittal of information and material seeking approval of the proposed emergency generator system was made by Fairbanks-Morse, through Ernst and Manhattan, to McCauley and referred to and reviewed by Lacefield. By letter, Lacefield sent to McCauley a list of comments and omissions concerning the submittal. He held the submittal pending receipt of additional material. No question was raised or mention made that the diesel engines were imported from England or that they were not standard products of Fairbanks-Morse. (MX 42) Additional material and information seeking approval of the generator system was forwarded by Fairbanks-Morse and Ernst on December 16, 1968, and January 3, 1969. (MX 43, 45, 46, 426, 427) All of the submittals were disapproved by McCauley on January 8, 1969, based upon a letter from Lacefield dated January 7, 1969, which noted 17 points of noncompliance. However, again there is no mention of the origin of the diesel engines. Lacefield's letter was transmitted to Manhattan and Ernst. (MX 45) Ernst severely criticized Fairbanks-Morse for the poor quality of the submittal material and demanded prompt action to obtain approval of the generators. (MX 428)

58. In addition to the correspondence and formal submittals of information by Fairbanks-Morse and Ernst in their efforts to obtain McCauley's approval of the proposed Fairbanks-Morse generator units, conversations and meetings took place. On February 4, 1969, Lacefield met in McCauley's offices with representatives of Fairbanks-Morse and Ernst to discuss the emergency generators. It was agreed that, in addition to all required material and information, Fairbanks-Morse would submit a list of existing installations of the units and complete data covering the diesel engines. (MX 47) On February 13, 1969, Fairbanks-Morse again met with Lacefield in Birmingham for discussion of the generators. The following day, Lacefield advised McCauley that he did not consider the Fairbanks-Morse units acceptable because, "The engine which is proposed for use on the sets is not manufactured by Fairbanks-Morse, but is made by the Dorman Company in England." For the first time, more than four months after receipt of the first submittal, Lacefield rejected the generators on the basis of information which he had had for over six months. (See 55 above) Ernst informed Fairbanks-Morse on March 20, 1969, that McCauley was rejecting the units based on the foreign manufacture of the engines. Ernst furnished Fairbanks-Morse a copy of the "General Conditions" section of the specifications, as requested, and again demanded immediate action to resolve the generator matter. (MX 429)

59. Following a telephone conversation between Manhattan and McCauley on March 13, 1969, McCauley wrote to Manhattan that the submittal generators were not considered acceptable. It said, "It is our understanding that these particular generators are made by the Dorman Company in England and marketed in this country by Fairbanks-Morse. We will accept the Fairbanks-Morse Company generators that are manufactured in this country. We request that you resubmit the generators." (MX 49) On March 20, 1969, Lacefield disapproved other shop drawings for the emergency generators stating only, "The generator sets submitted are not considered equal to those specified." (MX 50)

60. Ernst forwarded the disapproved submittals to Fairbanks-Morse on March 26, 1969, accusing Fairbanks-Morse of substituting items and placing the burden on it to obtain approval. Ernst pointed out that the delay in approval was already causing problems in the progress of the work and demanded immediate resolution of the problem to

avoid far more serious consequences. (MX 430)

61. On April 8, 1969, Fairbanks-Morse telephoned McCauley to discuss further the generator situation. McCauley told Fairbanks-Morse that its disapproval of the proposed Fairbanks-Morse engine generators was based primarily on a concern over the future availability of repair parts for the engines, a point nor required or mentioned in the specifications. McCauley did not indicate that it was rejecting the equipment because the engines were imported. By letter of April 14, 1969, Fairbanks-Morse assured McCauley that the same type of engines had been used satisfactorily in many installations for many years and enclosed a list of 33 installation locations and dates. Fairbanks-Morse stated that its decision to change marketing procedures on the engine would have no effect on its responsibility to maintain service parts for the engines and other components of the system. Fairbanks-Morse offered to guarantee and furnish a bond, if requested, that the parts would be available for at least 10 years. Fairbanks-Morse also stated that the standard warranty would be in effect on the equipment. (MX 51)

62. By its letter to Fairbanks-Morse dated April 11, 1969, Ernst reviewed "the positive points of advantage we may have in our goal of getting approval on your package." After reviewing the arguments which could be made in response to Lacefield's reasons for rejecting the generators, Ernst proposed a meeting between Ernst and Fairbanks-Morse to "coordinate and finalize our approach" in winning approval of the Fairbanks-Morse units. (MX 431)

63. On April 18, 1969, Ernst wrote Fairbanks-Morse stating in part, "In answer to your letter dated 1 April 1969, and supplementing my letter of 11 April 1969, I offer the following items that perhaps need further examination prior to resubmittal as they deviate from the letter of the specifications if not the intent." (MX 433) Ernst then listed twelve alleged deviations, including the fact that the engines were foreign made.

64. A meeting was held in McCauley's offices in Birmingham on April 21, 1969, attended by representatives of McCauley, Manhattan, Ernst and Fairbanks-Morse. The positions taken and statements made at that meeting are particularly illustrative of efforts by Fairbanks-Morse to gain approval of equipment which it knew did not comply with the requirements (MX 433) and of McCauley's failure to take decisive action which it, as the architect, had authority to take. Both of these caused the inordinate prolongation of the generator dispute and the damaging delays to construction progress on the project.

(a) At the outset of the meeting, McCauley and Lacefield explained that every component of the emergency generator system had been approved as submitted, with the exception of the engines. The only reasons for rejection of the engines were:

1. They were not a standard product of Fairbanks-Morse.
2. They did not meet the horsepower requirements of the specifications.

(b) Lacefield said that when he named Fairbanks-Morse in the specifications as an acceptable supplier, he had in mind a direct-opposing piston engine actually made by Fairbanks-Morse, rather than the Dorman engines made in England.

(c) Fairbanks-Morse stated that the generator units submitted had been its standard product since 1960 and were widely accepted. The engine referred to by Lacefield was said to be a marine-type engine, far exceeding the specification requirements and far more expensive. Fairbanks-Morse assured that the units submitted complied completely with the specifications and that it was fully cognizant of the critical importance of emergency generators in a hospital.

(d) When Lacefield questioned the horsepower capabilities of the engines, Fairbanks-Morse agreed to arrange and pay for independent testing of the engines to demonstrate their horsepower outputs. Fairbanks-Morse was willing to state 750 brake horsepower on the engine nameplates.

(e) Fairbanks-Morse said that Dorman had asked to discontinue it as the prime distributor for its engines, but that the change in marketing arrangements would not affect the availability of parts or Fairbanks-Morse's ability to furnish Dorman equipment.

(f) Lacefield promised to review and answer all pending questions and requests for clarification of the generator system drawings.

(g) McCauley stated that in its opinion the proper procedure to be followed would be to resubmit the equipment for approval. Fairbanks-Morse agreed to prepare a complete resubmittal of all equipment and auxiliaries for approval. (MX 53) Thus, six and one-half months after the Fairbanks-Morse units had been first submitted for approval and subsequently rejected, the result of the meeting was to start the entire process over again from the beginning at a time when construction progress was already seriously impeded.

65. As it had agreed in the April 21 meeting, Fairbanks-Morse hastily prepared a complete package of material and information to resubmit for approval of the previously-rejected emergency generator system. It was sent by Fairbanks-Morse via Ernst and Manhattan on May 2 and received by McCauley on May 12, 1969. (MX 56) It was referred to Lacefield for review. On May 23, 1969, Lacefield dispproved the resubmittal. (MX 54) On May 28, 1969, he returned it to McCauley "Not Approved as Noted and Approved as Noted". (MX 57) The rejected resubmittal was returned via Ernst to Fairbanks-Morse on June 9, 1969. (MX 59) This unwarranted process or resubmission and double rejection of the same equipment wasted a total of 49 days and further delayed construction progress.

66. John Carter, the manager of Ernst's office in Gulfport, Mississippi, who had direct responsibility for the project, sought advice from Johnson, Ernst's Vice President, on June 6, 1969, as to how he should proceed with the generator matter. On June 10, 1969, Johnson told Carter in an inter-office communication that under no circumstances should the purchase order contract with Fairbanks-Morse be cancelled. He instructed him in part:

> "A complete submittal should be returned to Fairbanks-Morse, along with a covering letter stating the following:
>
> We are very close to having a perfect submittal; however, there are a few areas as pointed out by the comments of the Architect/Engineer, on which he can still base disapproval on sound ground. We must work toward eliminating these few remaining areas of referring to and reading very closely the specifications and setting down on the drawings all requirements so as to reflect complete compliance with the requirements as spelled out in the specifications. We are determined to force approval as long as the facts, statements, etc. shown on the drawings indicate substantial compliance with the requirements as stated in the specifications."

Mr. Carter followed Johnson's instructions and on June 11, 1969, wrote Fairbanks-Morse with suggestions for preparation of still another submittal on the rejected generators. Ernst said in part:

> "In an effort to clarify the new submittal based upon the Architect/Engineers disapproved drawings, we ask you to provide the following as a minimum requirement, and add any pertinent facts you deem necessary to fully comply with the plans and specifications. (A)1. Your 'Engine' proposal must include all items covered in the specifications. I suggest your submittal be given with a word-for-word copy from the specifications." (MX 435)

67. On July 1, 1969, Fairbanks-Morse sent a resubmittal covering all items of the generator system which Lacefield had disapproved or questioned

in May. This resubmittal was, in effect, a word-for-word copy of the specifications, including references to the pages of the specifications from which the information was taken. This was forwarded to and received by Lacefield on July 17, 1969. (MX 59) Lacefield reviewed this resubmittal and made several handwritten comments. He noted that the engine horsepower curve did not contain sufficient information on the test conditions. Conditions weren't stated for the generator output and ratings. He said that the stated engine horsepower of 950 and 1800 RPM did not agree with the curves submitted earlier and the published information concerning the engines. He repeated that the engines were not a standard product of Fairbanks-Morse. On July 25, 1969, he stamped the submittal "Submit specified item" (MX 59) and returned it to McCauley on August 11, 1969. (MX 60)

68. On September 2, 1969, Fairbanks-Morse talked by telephone with Lacefield about the emergency generator system situation. Lacefield stated that he wanted to have an unbiased observer witness a test of the engines at 950 horsepower run at Fairbanks-Morse's Beloit plant under operating conditions duplicating those of the job site. Although it had volunteered during the April 21, 1969, meeting to pay for independent testing, Fairbanks-Morse now refused to perform the tests unless the expenses were reimbursed by Ernst and unless it was agreed that, upon satisfactory completion of the tests, ". . . there will be no further conversation regarding these engines being, or not being, Fairbanks-Morse standard products." (MX 65) It was also suggested by Fairbanks-Morse that all verbal commitments of Lacefield be reduced to writing. (MX 65) Ernst informed Manhattan that the tests under discussion were beyond the requirements of the specifications and would be performed only if someone bore the expense. (MX 65)

69. Fairbanks-Morse wrote Ernst on September 23, 1969, again arguing that its generator units should be approved. It said that any engine which it had marketed for 10 years should be considered its standard product. Fairbanks-Morse sought to sidestep the question as to the horsepower capability of its engines by stating, "This question of ability to produce that level of horsepower (950) is academic because the only real interest on the part of the user is, we are sure, will the engine produce 600 KW continuously and 660 KW in any 2-hour period." (MX 66)

70. In his letter of September 19, 1969, Lacefield told McCauley that, based on published data, he was of the opinion that the engines proposed by Fairbanks-Morse did not meet the requirements of the specifications. He said that another Fairbanks-Morse model ten-cylinder engine would comply. The specifications, however, required a twelve-cylinder engine. (MX 67) McCauley sent Lacefield's letter to Manhattan, commenting that Fairbanks-Morse had created its own problem by submitting conflicting and inconsistent data. It asked for verified performance test results supporting the horsepower curved at the expense of Fairbanks-Morse. McCauley then said, "The motor generator as originally submitted is disapproved and until satisfactory reports and tests are received verifying that it meets the specifications, we cannot approve this motor generator." (MX 67) Thus, McCauley continued to invite further submittals on the generator units which it had already rejected for other reasons. It thereby prolonged the delay in construction. Manhattan forwarded these letters to Ernst.

71. On October 1, 1969, Fairbanks-Morse wrote to Ernst: "The Fairbanks-Morse model engines proposed for the contract will produce 950 horsepower for 24 hours as defined in the contract specifications. . . ." That letter was signed by a vice president and general manager of Fairbanks-Morse, and his signature was notarized. (MX 68) This was intended to be the requested "certified proof of engine performance".

(MX 69, last page, item 22; MX 78, page 12)

72. McCauley called a meeting on October 30, 1969, to attempt to resolve the generator problems. (MX 74) The meeting was attended by representatives of all of the parties.

(a) McCauley stated that the only item that was disapproved or rejected was the engine and that this item was only rejected on the basis that in its opinion the engine was not a standard product of the manufacturer, Fairbanks-Morse. Fairbanks-Morse again argued that it must be its standard product because "quite a few" of them had been sold. In response to a direct question, Fairbanks-Morse said it had given up its distributorship for Dorman engines in the second quarter of 1969. Fairbanks-Morse also reiterated its prior assertion that it would furnish parts and service for its equipment for 10 years.

(b) When the horsepower of the Dorman engines was questioned, Fairbanks-Morse stated that the proposed equipment met all the requirements as stated in the specifications. It also said that the proposed units were the only Fairbanks-Morse products which met the specification requirements.

(c) Lacefield produced a booklet containing comparative data on various generator units and stated that the Dorman engines were shown to have 827 horsepower.

(d) Lacefield said that when he listed Fairbanks-Morse as an acceptable supplier of the generator units in the specifications, he had in mind a Fairbanks-Morse unit other than the one proposed by Ernst. It was then shown that the unit referred to by Lacefield was longer than the length specified.

(e) Fairbanks-Morse was reminded of its offer on April 21, 1969, to perform tests to prove the performance of the Dorman engines. Fairbanks-Morse said that there had not been a timely acceptance of that offer.

(f) Providence stated that the proposed Fairbanks-Morse equipment was rejected and that the contractor would be directed to submit an engine generator unit to meet the specifications. (MX 78)

73. On November 3, 1969, McCauley wrote to Manhattan confirming rejections on the proposed Fairbanks-Morse equipment at the October 30 meeting. McCauley noted that Ernst had declared during the meeting that, if Ernst furnished the emergency generator sets, they would be the Fairbanks-Morse equipment as submitted and nothing else and that considerable further delay would result. Also noted were the conflicting and spurious performance curves which had been submitted and Fairbanks-Morse's discontinuance of its distributorship for the English-made Dorman engines. McCauley stated that the other Fairbanks-Morse model ten-cylinder engines would be acceptable and that the size restrictions could be waived. (MX 77) Manhattan sent a copy of McCauley's letter to Ernst, requesting action as soon as possible. (MX 77) On November 17, 1969, Fairbanks-Morse repeated its assertion that the proposed equipment complied with the requirements of the specifications. (MX 80)

74. On December 5, 1969, Manhattan requested that McCauley take some definitive action on the emergency generator matter. (MX 84) On January 16, 1970, the request was repeated. (MX 86) Again, on January 27, Manhattan asked McCauley to resolve the impasse, since under the contracts only the project architect had the power to do so. (MX 88, pg. 8) On January 23, 1970, Manhattan notified Providence that it requested an unlimited extension of the completion date due to McCauley's lack of cooperation. (MX 88, pg. 10)

75. On February 19, 1970, McCauley sent to Manhattan, Providence and the State Health Department the promised listing by Lacefield of the reasons for

rejection of the proposed Fairbanks-Morse generator sets. Lacefield said:

(a) The Dorman engines were not a standard product of Fairbanks-Morse and were not advertised by it in the 1968 edition of *The Diesel and Gas Turbine Catalog*. The other Fairbanks-Morse model was advertised.

(b) The performance curve submitted by Fairbanks-Morse in December of 1968 showed the continuous horsepower output of the Dorman engines to be 830. With adjustments for water temperature, the horsepower would be even less.

(c) His investigation had revealed that there had been a great deal of trouble experienced with the Dorman engines.

(d) The Dorman engine did not meet the requirements of the specifications.

(e) He did not "feel" that he could approve the engines. (MX 92)

Manhattan transmitted this information to Ernst with a request for an immediate re-evaluation of the generator situation. (MX 93)

76. On the same day, February 19, McCauley notified Manhattan and Providence that, at the request of Clay Dean of the State Health Department, a meeting would be held on March 2, 1970, to make a final disposition on the emergency generator. (MX 88, pg. 9) That meeting was held in Mr. Dean's office in Montgomery on March 6, 1970.

(a) Mr. Dean reviewed the specifications and stated that ". . . he could see no objections or problems with the generator set that was proposed and asked McCauley what the problem was." (MX 95, pg. 3) McCauley and Lacefield responded that the proposed generator units were unacceptable because they were not standard products of Fairbanks-Morse; the engines being made by Dorman.

(b) Ernst replied that Fairbanks-Morse had guaranteed to all parties that the units proposed would satisfy all aspects of the specifications and had offered to perform tests and any other requirements. McCauley's reply was that the owners did not want Fairbanks-Morse units. (MX 95, pg. 3)

(c) Mr. Dean advised McCauley and Providence that he felt sure that this project was already in trouble due to these delays. He remarked that any time a specified material was rejected it had to be spelled out in writing why it was rejected. He noted that this generator was rejected numerous times and marked not approved for reasons noted, but no notations made. (MX 95, pg. 3)

77. Another meeting was held on March 10, 1970, in McCauley's offices in Birmingham. At that meeting McCauley advised Manhattan that, "We will accept the generator providing you perform tests in which Mr. Lacefield will set the criteria of the tests for the generator to be tested under and providing that you will assure us on a gentlemen's (sic) word that there will not be a lawsuit." (MX 96) Manhattan refused the offer. McCauley in return stated, "Well, we will accept the generator," and instructed Lacefield to write the criteria on which he wanted the generator sets tested by Fairbanks-Morse. Lacefield promised to furnish the test criteria promptly. (MX 96)

78. On March 16, 1970, still another meeting was held to discuss the emergency generators, this time at the job site in Mobile. At that meeting, McCauley reversed itself and disapproved the proposed Fairbanks-Morse units, notwithstanding its approval of them six days earlier. (MX 98, pg. 2) McCauley's reversal was prompted by a letter from Providence on that date which ordered it to get an approved generator installed without further delay. (MX 97) On the following day, March 17, 1970, it wrote to Manhattan: "This reaffirms our position stated in our letter of February 19, 1970, in which the engine generator as submitted by your subcontractor, was not approved." It then requested submission of a generator complying with the contract documents. (MX 97) These actions by McCauley completely ignored its assurances during the March 10 meeting that the proposed Fairbanks-Morse units were approved and that testing criteria would be furnished.

79. On March 31, 1970, Lacefield wrote to McCauley reminding it that Dean, of the State Health Department, had said that the objections to the Fairbanks-Morse units on the basis that they were not Fairbanks-Morse's standard product should be withdrawn and the units accepted if they demonstrated satisfactory performance. Lacefield suggested that the proposed units be given tentative approval, with final approval to be given upon satisfactory completion of testing. This conclusion by Lacefield came almost 18 months after the original submittal. Lacefield then set out the testing requirements for the generators. (MX 101)

80. On April 3, 1970, Dean wrote a strongly-worded letter demanding that McCauley furnish a detailed statement of the particulars in which the proposed Fairbanks-Morse generator sets failed to meet the technical requirements of the specifications, if they did not, in fact, do so. He also requested a detailed statement comparing the Fairbanks-Morse model generator units, which McCauley had said would be acceptable, with the specifications.

81. Providence instructed McCauley to get approved generators installed in the project without further delay. (MX 103) However, on April 10, McCauley repeated the same request for submission of generators meeting the specifications. (MX 105)

82. On April 24, 1970, Providence told McCauley that it was holding McCauley, as the project architect, responsible for the delays and demanded immediate action. Providence pointed out to McCauley that the lack of emergency generators would prevent use of the new building upon its completion and that this would further delay Manhattan in being able to perform the remaining renovation work in the existing building. However, on April 24, 1970, McCauley again wrote to Manhattan with the redundant request for submission of an emergency generator system which would meet the requirements of the specifications. (MX 113)

83. On April 29, 1970, Lacefield produced the oft-requested and long-awaited detailed statement of the reasons for rejection of the proposed Fairbanks-Morse units. He gave two reasons:

(a) First, the proposed equipment was not the "standard Product" of Fairbanks-Morse. Lacefield made no mention whatsoever of the fact that the engines were imported from Dorman in England.

(b) Second, that the horsepower capacity of the engines was inadequate. (MX 115)

84. On May 4, 1970, McCauley wrote to Manhattan by registered mail:

"This is to inform you that the engine generator as previously submitted has been disapproved for the above project. We request that you submit immediately an engine generator that will meet the contract documents." (MX 116)

On May 15, 1970, over nineteen months after the first submittal on the emergency generator system, McCauley wrote to Manhattan and stated in part:

"In accordance with this paragraph the Architect is designating the following equipment that will be acceptable:

1. Caterpillar 398
2. Fairbanks-Morse 38F5¼
3. General Motors

McCauley had the same power and prerogative to designate specific units and require they be supplied in November of 1968, following the disapproval of the first submittal of data on the proposed Fairbanks-Morse units. McCauley and/or its agent and consultant, Lacefield, knew at that time the very facts upon which the final rejection w.

based. Lacefield knew even before the submittal was made that the proposed units were powered by diesel engines manufactured by Dorman and imported from England. (See 55 above) As early as June 1968, Lacefield knew that the published data on the units showed the horsepower to be less than required by the specifications. (MX 33; See 54 above) McCauley apparently also knew early in the proceedings that Providence did not want Fairbanks-Morse equipment installed in the project, notwithstanding its designation in the specifications as an acceptable supplier.

85. Upon receipt of McCauley's directive listing three acceptable models of generator sets, Manhattan obtained price quotations on each unit. (MX 121, 124, last page) On July 3, 1971, Manhattan submitted to McCauley for review preliminary information on Caterpillar model D398 generating units, which it proposed to furnish. (MX 128) This was referred by McCauley to Lacefield for examination. (MX 128) On July 8, Lacefield gave conditional approval to the Caterpillar units, (MX 129) which was forwarded to Manhattan. (MX 130) Manhattan sought to have Ernst purchase the generators, as it was required to do under the subcontract, but Ernst refused to do so unless it was assured of payment of over one-half million dollars in claims which it asserted for losses allegedly sustained by it as the result of delays. (MX 134)

86. On August 31, 1970, Manhattan contracted with Thompson Tractor Company of Birmingham to supply the emergency generator system, including two Caterpillar model D398 diesel-powered generators, for a total price of $137,872.53. (MX 136) This cost was $54,132.53 more than the price at which Ernst had contracted to purchase the sub-standard non-compliant Fairbanks-Morse units. (MX 136, MX 41)

87. Once it was assured that the generator units to be installed would be Caterpillar, McCauley made efforts to expedite the progress of the work. (MX 136, MX 41). It was agreed that submittal, review and approval of shop drawings, etc., could be handled directly between Lacefield and the supplier, without the necessity of forwarding and return through each contractor involved, as it had been required in connection with the proposed Fairbanks-Morse units. (Tr. 1954–6, 1969)

88. When the Caterpillar units were ordered, Thompson Tractor Company expected that the units would be ready for factory testing by the middle of December 1970, and depending on the outcome of the tests, would be delivered to the job site by January 1971. (MX 139) Because of unanticipated and unavoidable problems and delays in production, completion of the generators was delayed beyond the anticipated date. (Tr. 1958–60, 2764; EX 438) McCauley agreed to waive the rigid requirements of the specifications for assembly and testing of the generators and engines at the factory prior to shipment and permitted all tests to be run at the job site after installation was complete. (MX 145)

89. The Caterpillar engine generators were received at the job site on March 19, 1971. (Tr. 1766–7) The installation was completed and the performance tests were run on May 17 through May 23, 1971. Lacefield witnessed these tests and approved the results. The emergency generator system was given final approval by Lacefield during an inspection on June 21–25, 1971. (McX 83, pg. 15; Tr. 507) Building A was finally accepted by Providence and occupied on July 1, 1971, with the exception of the operating rooms, which could not then be used because of defects in Ernst's installation of the explosion-proof receptacles, as discussed above. (Tr. 269; PX 4)

[6] 90. The total cost to Manhattan for purchasing and installing the emergency generators system and its various components was $150,637.12. (Tr. 419) The system and its installation was to have been furnished by Ernst under its subcontract. Ernst's subcontract price included the sum of $89,011.00 for the generator system and its installation, an amount $61,626.12 less than the actual cost to Manhattan. (Tr. 419–27) Ernst included the full sum of $89,011.00 in its billing to Manhattan for the subcontract work. (Tr. 421) Manhattan is entitled to reduce the amount due to Ernst under the subcontract by the entire amount of $150,637.12 which it cost to obtain and install the emergency generator system.

[7] 91. In turn, Fairbanks-Morse is liable to Ernst under their contract for the difference between the purchase price of the emergency generator system, as incurred by Manhattan and refunded by Ernst, and the price of the proposed Fairbanks-Morse system, to wit: $137,872.53 minus $89,011.00 or a total of $48,861.53.[5] Additionally Fairbanks-Morse is liable to Ernst for other damages which Ernst has incurred as a result of Fairbanks-Morse's breach of their contract. Thus, Fairbanks-Morse is liable for the additional installation costs incurred by Manhattan and refunded by Ernst which were in the amount of $12,764.59. As a result, Fairbanks-Morse is liable to Ernst in the total amount of $61,626.12.

92. The emergency generator system was an essential component of the project in that, until it was operative, Building A could not be occupied and used by Providence even if all other work was completed and accepted. (MX 102) Because of the inordinate delays discussed above in obtaining a decision as to the generator units which were to be purchased and installed, these components were not available for installation at the appropriate time in the construction sequence. This delayed not only the other work which could not be done before the generator system was installed, but also delayed the ultimate completion of the project. (Tr. 2071, 2584–9, 2619, 2636, 2646) Although much of the work in Building A could go on without the generators being in place, when it unavoidably became generally known that installation of the generators and, therefore, ultimate completion and acceptance of the building would be indefinitely delayed, a "flattening out" of, or loss of efficiency in, the progress of all work occurred. (Tr. 2595–6, 2649, 2652, 5593)

93. While it is difficult to fix with certainty the number of days that the ultimate completion of the project was extended or delayed by the dispute regarding the emergency generators, as set out at length above, the evidence establishes conclusively that, if the generators had been available for installation when they should have been Building A would have been complete and ready for acceptance and patient occupancy by January 15, 1971. (Tr. 278, 2649, 2656, 3437) The sixth, fifth, fourth and third floors of Building A were accepted on January 7, 8, 12 and 15, 1971, respectively, except for the generators. (Tr. 320, 2062–3) As found above, however, Building A was not accepted and occupied by Providence until July 1, 1971. Thus, as the proximate result of the generator dispute, there was a delay of 161 days. Since the remaining renovation work in the existing building could not be undertaken until the patients could be moved into Building A, the ultimate completion and acceptance of the project was equivalently delayed.

94. In addition to the above, it should be pointed out that the emergency generator specifications as prepared by McCauley were, in the opinion of the Court, legally deficient. McCauley, as the architect, was responsible for the drafting of accurate and complete plans and specifications and, in preparation thereof acted as an independent contractor rather than as an agent for Providence. The specifications were written in disregard of applicable regulations and requirements of both the Department of Health of the State of Alabama and HEW. As written, they did not

5. The difference in figures in paragraphs 90 & 91 for the generator system, i. e., $150,637.12 and $137,872.53, respectively, is explained by installation expenses in addition to the purchase price of $137,872.53.

comply with HEW regulations in that they failed to satisfy the requirement that the "product shall be identified by brand name, genetic name and model number and/or such other description that will clearly indicate the identity of the item." With regards to the engines for the emergency generators, the specifications provided only that they "shall be Caterpillar D-398, Fairbanks-Morse or General Motors." The only engine described in the specifications by name, manufacturer and model number was the Caterpillar D-398. In addition, the Caterpillar D-398 did not meet the engine performance requirements as laid out in the specifications, as that engine also fell short of the required horsepower output. Fairbanks-Morse, one of the other two manufacturers listed, did not manufacture any engine which could meet the performance requirements.

95. Lacefield testified that, at the time he wrote the specifications, he did not know of a single 1800 RPM engine of any manufacturer which complied fully with the specifications. (Tr. 2976) The specifications called for an output of 950 horsepower. In contrast, the published data on Caterpillar equipment showed horsepower capabilities of only 750, 850, 675 and 770. Fairbanks-Morse, which had sought a pre-bid approval of its engine, provided McCauley with data clearly showing that its engine produced 935 horsepower at 1800 RPM.

96. Finally, the specifications were also incorrect in respect to the allocation of space for installation of the engines. The Caterpillar engines were ultimately selected and installed with McCauley's approval. However, the space allocated for the emergency generator engines as provided in the architect's drawings was not sufficient to accommodate the Caterpillar engines.

97. Coupled with the deficient specifications and contributing to the delays in the project as a whole was a general failure on McCauley's part to promptly handle change orders and act upon submittals made by the various parties involved.

[8] 98. The Court is of the opinion that the deficiencies in McCauley's plans and specifications and McCauley's failure to act promptly on submittals contributed materially to the problems and delays in the installation of the emergency generator and to the overall delay in the completion of the project. Thus, McCauley must share in the responsibilities for these delays.

99. The responsibility and liability for the losses and damages resulting from this delay should be borne by the responsible parties in the following proportions: Fairbanks-Morse–50% and McCauley–50%, because of their actions and failures to act, as found above. The further issue of liability of Ernst and Fairbanks-Morse for punitive damages is hereinafter discussed. The fact that McCauley was correct in its conclusion that the proposed Fairbanks-Morse generator units did not comply with the requirements of the specifications does not, in any manner, justify or excuse McCauley from its responsibility for the delays which resulted from its mishandling of the submittals. In conclusion, Fairbanks-Morse and McCauley are each responsible for 80½ days delay in the completion date of the project.

B. THE ISSUE OF FRAUD BY ERNST

[9] 100. As is discussed in greater detail both above and hereinafter, Fairbanks-Morse was responsible for a considerable amount of the delay which occurred from the problems in the selection and installation of the emergency generator system and was in fact guilty of gross misconduct in its submissions to Ernst and the other parties. As to whether or not Ernst joined in this gross misconduct with Fairbanks-Morse presents an extremely close question.

101. In its cross-claim, Manhattan alleges fraud against Ernst in the emergency generator phase of this litigation.

This alleged fraud is based upon a series of correspondence between Ernst and Fairbanks-Morse concerning the emergency generator units. This correspondence has already been discussed in detail above in paragraphs 63 and 66.

102. The problem presented is whether or not this series of correspondence when taken together ties Ernst into the fraud perpetrated by Fairbanks-Morse. The Court does not think that it does. It must be remembered that these documents were not drafted by lawyers. Had the authors of these documents realized that the documents would ultimately wind up in court and be scrutinized by skilled lawyers, they would have sought the assistance of their various legal departments for the drafting of these documents. The facts, however, are that they were drafted by engineers in an effort to fulfill a contract of considerable size. If contractors, subcontractors, engineers, architects and owners, in attempting to carry out a sizeable contract, sought legal assistance in the drafting of all letters and inter-office correspondence, such contracts would never be performed.

103. Manhattan insists that the phraseology used in the June 11, 1969, letter from Ernst to Fairbanks-Morse, namely, "I suggest your submittal be given with a word-for-word copy from the specifications", (MX 435) shows that Ernst realized that the emergency generator did not meet the specifications but, nevertheless, insisted that the resubmittal be word-for-word from the specifications. The Court does not agree with Manhattan's interpretation of that letter. It seems to the Court that it is susceptible to a different interpretation. The Court would interpret the letter as saying, "If your product meets the specifications which are herein set out, resubmit it, if it does not, say so, and we will go elsewhere."

104. To this extent the document is ambiguous, and the Court realizes that under ordinary circumstances it would be construed more strongly against the drafter. But on the other hand, Manhattan is the one asserting the fraud. Therefore, the burden of proof is on Manhattan to clearly and unequivocably establish that fraud did exist. The Court feels that Manhattan has failed to present evidence sufficient to establish fraud on Ernst's part.

C. THE ISSUE OF FRAUD BY FAIRBANKS-MORSE

[10] 105. It is unusual when overt fraud in business transactions can be proved and documented. But in this case, such fraud has been proved clearly and cogently principally by material from the files of the guilty party. Fairbanks-Morse continuously sought to obtain approval of the proposed emergency generator units by means of flagrant and false representations, while knowing full well that the units did not comply with the requirements of the specifications.

106. In 1961, Fairbanks-Morse had become the franchise distributor in America for diesel engines manufactured in England by W. H. Dorman and Company. Fairbanks-Morse placed on all such engines its own nameplates identifying itself as the manufacturer. (EX 588) The engines, included in the units which Fairbanks-Morse and Ernst proposed to install in the project, were identified by Dorman as Models 12 QTCW and by Fairbanks-Morse as Model 50 A6 TCW 12V. (Tr. 4261, 4634; EX 631)

107. In February 1971, the Court determined that these Dorman engines did not meet the requirements of the specifications for this project. Perhaps Fairbanks-Morse could have stood on the position that its equipment was "equal" to the Caterpillar D–398. However, Fairbanks-Morse went further and represented that its equipment could meet the specifications. The Court finds Fairbanks-Morse guilty of fraud and bases this finding on the following points discussed below which were documented during the trial.

108. At all relevant times, Fairbanks-Morse knew that its equipment

could not satisfy the performance specifications for the project. Such times include the time when Fairbanks-Morse bid its equipment for use on the project the time of Fairbanks-Morse's several submissions through Ernst and Manhattan to the architect, the time of commencement of this action in October 1970, and the time of trial of the declaratory judgment count in February 1971.

109. Fairbanks-Morse intended to supply engines on the project which not only were in a cannibalized condition, but which had previously been sold by Fairbanks-Morse to other customers and, after failures, returned by them to Dorman to be rebuilt and repaired. The specifications clearly required that all equipment installed on the project had to be new equipment.

110. Fairbanks-Morse knowingly misrepresented to the other parties that its proposed equipment would meet the specifications. It was on the basis of such continued misrepresentations from responsible officials of Fairbanks-Morse that the other parties continued to discuss the possibility of accepting the Fairbanks-Morse equipment. Covertly and not revealed until the actual trial of this action, Fairbanks-Morse knew that any claims which it made regarding compliance with the specifications had already been disproved by Dorman and that Dorman would specifically refuse to endorse claims of the nature and to the extent that Fairbanks-Morse was making to the other parties. Fairbanks-Morse also hid the fact that its own representatives acknowledged orally and in writing among themselves that the proposed equipment did not meet the requirements of the specifications and did so at the very same times that Fairbanks-Morse was proclaiming to the parties here that the equipment did comply.

111. Fairbanks-Morse had been guilty of a program of deliberately overrating of Dorman engines and persisted in such flagrant misconduct despite protests and written objections by Dorman. For more than one year prior to the bidding on this project, Dorman had been telling Fairbanks-Morse that Fairbanks-Morse was unjustifiably overrating their engines in its sales and promotional brochures, that there was no justification for the overrating and that Dorman objected. Fairbanks-Morse knew that any overrating of the engines constituted the violation of, and avoiding of, Dorman's guarantee as manufacturer.

112. For the purpose of this project, Fairbanks-Morse created curves which were misdated, were based upon no testing data and were inconsistent with other performance curves not only supplied by Dorman but actually in Fairbanks-Morse's possession. Fairbanks-Morse did this in its attempt to convince the other parties involved that the Dorman engines would meet the performance specifications of the project, although Fairbanks-Morse knew they would not.

113. Fairbanks-Morse experienced an unbelievable history of performance failures, warranty claims and the like in its distribution of the Dorman engines. This played a primary role in leading to the eventual termination of the relationship between Fairbanks-Morse and Dorman. Contrary to Fairbanks-Morse's representations to the effect that Dorman was the instigator of the termination of their relationship, Fairbanks-Morse's own records showed that it was Fairbanks-Morse which initiated and demanded the termination.

114. When the facts reviewed in the foregoing paragraphs are considered with the matters reviewed in Findings 50 through 99 concerning the difficulties and losses resulting from the delays in finally obtaining approval of an acceptable emergency generator system for the project, the finding is inescapable that Fairbanks-Morse knowingly, deliberately and flagrantly represented falsely the quality and performance capabilities of the proposed Dorman-powered generators in an effort to have them approved for installation in the project. These misrepresentations were made by Fairbanks-Morse with the knowledge and expectation that they would be believed and relied upon by other parties. The other parties did rely upon the misrepresentations with the result that the project was delayed and substantial losses were incurred.

115. Under all the facts the Court finds that it is just and proper that Fairbanks-Morse be required to pay punitive damages to Manhattan and Ernst because of the fraud committed upon them with regard to the emergency generator system. There is no yardstick by which the assessment of punitive damages can be measured except that the greater the wrong the greater the damage. In this instance, the price of the generator units proposed to be furnished was $81,000.00. Any figure close to, or exceeding this amount, would be disproportionate. The Court finds that the total amount to be assessed against Fairbanks-Morse as punitive damages is $40,000.00 to be paid in equal amounts of $20,000.00 to both Manhattan and Ernst.

The Issue of Delays by Providence

116. Manhattan and Ernst insist that Providence is responsible for further delaying the completion of the contract because of its failure to release to Manhattan space in the existing building as rapidly as it should have been. They are looking at this through the eyes of contractors trying to perform work. Providence had to look at it from a two-fold purpose; first, and primarily, from its duty and responsibility to operate a hospital in an efficient manner during the time in question. Providence could not possibly release the operating rooms in the existing building until the operating rooms in Building A had been completed in all respects if the surgical needs of the entire hospital were to be met. Secondly, Providence had to look at it from a standpoint of releasing space in the existing building as rapidly as possible to Manhattan as set out in the plans and specifications. With the exception of the 39 days delay heretofore discussed in Paragraph 14, the Court does not feel that Providence should be charged with any further delay in the completion of the contract due to the manner in which it released space in the existing building.

The Issue of Manhattan's Supervision

[11] 117. The Providence Hospital project was fraught with many problems and delays which should be attributed to the lack of proper management, coordination and supervision by the general contractor. The following findings relate to matters which are the responsibility of Manhattan.

118. A continual problem which contributed substantially to the development of other problems and to considerable delays was Manhattan's failure to coordinate properly the work on the job. Manhattan failed to prosecute the work with such diligence which would assure its completion within the time specified for completion as enlarged by the duly authorized extensions of time. Under paragraph 21(c) of the general conditions of the construction contract, Manhattan was responsible for the coordination of the trades, subcontractors and materialmen engaged upon the general contractor's work. Pursuant to paragraph 21(c), Manhattan was responsible for any lack of coordination and/or poor general administration of the project. There was ample evidence of this lack of coordination and supervision during the course of the trial. (Tr. 3323, 3339–4, 4363–4, 4368, 3327–9, 3343, 3326–7, 3496–7, 3475–6, 4235, 3483, 4187; EX 371, EX 318, EX 71, EX 454)

119. There were substantial delays in the performance of a number of items of work which were the responsibility of either Manhattan alone or Manhattan's subcontractors which are not parties to this action. The responsibility for these delays rest with Manhattan and cannot be passed on to any of the other parties. Manhattan's Ex. 299 is a bar chart which was especially adapted for the trial. It shows not only when the work was scheduled to be done but also w..

the work in fact was performed. This exhibit reflects delays in the following areas: The concrete work on the floor slabs for the new buildings and on the roof, the face brick work, the concrete block work, the structural glazed tile, cast stone work, limestone and greenstone work, structural and miscellaneous steel work, carpentry work, millwork, wood door work, roofing and sheet metal work, membrane and waterproofing work, caulking work, hollow metal doors and framework, window work, protection screen work, aluminum doors and frame work, glass and glazing work, painting work, vinyl wall fabric work, ceramic and quarry tile work, mastic conductive work, carpet work, acoustical treatment work, lath and plaster work and finished hardware work.

120. Another problem which contributed to the delays in the project was Manhattan's failure to provide additional manpower, including double shifts, when requested to do so by McCauley and required by the general conditions of the construction contract. That contract provided as follows:

> "In the event that the contractor shall for any reason fall behind schedule, he shall promptly put double shifts of labor on the work and take such other steps as the architect may require to expedite the work to insure that it shall be fully completed within the stated time."

In spite of requests for more manpower, Manhattan did not comply with this provision except in the most minimal respects. (Tr. 390, 1825, and 3517-8)

121. Manhattan also failed to schedule work properly. Unknown to its subcontractors Manhattan had contemplated that there would be an additional period of one year beyond the contract's specified completion date within which renovation work could be performed without penalty. Thus, as contemplated by Manhattan, the total original contract time would have been three years. Despite this, Manhattan prepared a bar chart schedule for the performance of the work, which was approved by Providence and McCauley and which depicted the entire performance of the project within 730 days. The bar chart did not indicate any additional grace period for performance of the renovation work, as contrasted with new construction, either by the general contractor or by any subcontractor. Thus, the chart as finally approved purported to show the performance of the total contract within the two year time frame, including the renovation work. This was so despite the fact that Manhattan personnel who were witnesses at the trial testified that they believed that there was to have been an additional one year for performing the renovation work. (EX 103; Tr. 2731, 2719, 2735, 2740) It was also their testimony that until 1972 they were never aware that Providence even conceived that there could be a claim for liquidated damages without allowing at least one year beyond the contract time completion date for performance of the renovation work. (Tr. 2739, 2740) In addition and contrary to conventional and proper practice, there was no bar chart for the performance of this project until March 31, 1969, which was more than six months after the starting date. (Tr. 2700, 2226) Due to the inaccuracy and inconsistencies manifested by the Manhattan bar chart, the project incurred additional delays.

122. While it is impossible with any degree of accuracy to apportion to any particular part of the work the number of days of delay caused thereby, nevertheless, Manhattan's failure to supervise and coordinate the work did cause considerable delay which the Court fixes at sixty days. Manhattan attempted to exonerate itself as being the cause of any delay and attribute it to the other litigants. As to this they bore the burden of proof which the Court does not think they met. Accordingly, the Court assesses sixty days as the amount of delay to be charged to Manhattan for its failure to properly supervise and coordinate the work.

Is Providence Entitled to Judgment Over Against McCauley

[12] 123. The Court recognizes the well established proposition that an architect is the agent for the owner and the owner is responsible for any damages caused by the architect's deficiencies insofar as other parties are affected thereby. In the instant case, Providence has claimed over against McCauley for certain days for which Providence has been held liable to other parties. Insofar as any penalty which has been charged to Providence as a result of McCauley's inefficiency, the Court finds that McCauley is liable to Providence under Providence's claim over against McCauley.

[13] 124. No contractual agreement existed between McCauley and Providence concerning liquidated damages arising from delays in the completion of the project as was provided for in the contracts between Providence and Manhattan and Manhattan and Ernst. However, McCauley itself was instrumental in the inclusion of the $250.00 liquidated damages provision in the Providence-Manhattan contract. It is therefore reasonable to utilize that amount in awarding damages as between McCauley and Providence for delays in the completion of the project which were caused by McCauley.

125. The Court has found above that, in regard to the selection of the bed light fixtures and the emergency generator system, McCauley was responsible for 29½ and 80½ days of delay, respectively. Therefore, the Court finds that McCauley is liable to Providence for a total of 110 days of delay in the completion of the project or a total of $27,500.00 in damages.

Arbitration

[14] 126. Providence filed motions to dismiss for failure to arbitrate certain of the elements of controversy which were denied by the Court. Disagreements commenced as early as 1969 and continued up until the date of the trial in 1973. During the 33 months period in which the suit was pending prior to trial, Providence participated actively in extensive discovery proceedings in preparation for trial. It at no time sought to start arbitration. Manhattan wrote several letters to Providence and Ernst seeking cooperation in activating the arbitration procedure. In fact, Providence at one time stated that if Manhattan should persist in its efforts to arbitrate, Providence would prevent the same by filing the law suit. The law is clear that the failure to invoke the provisions of permissive arbitration is the equivalent of a waiver of such provisions. The inactions of Providence in this regard was tantamount to such waiver.

Attorney Fees

[15] 127. Providence seeks to recover attorney's fees and expenses against Manhattan under indemnity provisions of their contract. While the contract does contain an indemnity provision, it does not cover any fees and expenses incurred by providence in this litigation. The indemnity provision of the contract includes only costs, expenses and attorney's fees for damage to property or bodily or personal injuries arising from construction activities or the construction contract, none of which exist in this litigation.

128. The contract between Manhattan and Ernst does contain an indemnity provision by which Ernst agreed that if Manhattan should become liable to Providence for delay in completion of the project and if the delay was caused by Ernst's failure to perform its subcontractual obligations in a timely manner, Ernst would pay the full amount of Manhattan's liability to Providence and would in addition reimburse Manhattan including costs and attorney fees. Ernst did in fact cause delays in the ultimate completion of the contract for which Manhattan is technically liable to Providence. However, as pointed out above, Manhattan is in turn entitled to

recover from Ernst liquidated damages for each such day of delay caused by Ernst. It would be difficult, if not impossible, to a certainty to allocate attorney fees and expenses to that delay. Furthermore all claims among the parties were litigated in the trial and each party represented itself and only itself. Manhattan di l not expend attorney fees in defense of any claims arising from delays caused by Ernst, but to the contrary, actively asserted Ernst's responsibility and liability for those delays. An award of attorney fees to Manhattan and against Ernst is therefore not warranted, nor is such mandated by their contractual agreement.

129. Both Manhattan and Ernst seek indemnity against Fairbanks-Morse for attorney fees and expenses. The Court has heretofore found Fairbanks-Morse guilty of fraud and for such has fixed punitive damages in favor of both Manhattan and Ernst. Without characterizing the elements constituting the quantum of punitive damage, suffice it to say, the Court does not feel that any additional amount should be added to this for attorney fees and expenses.

130. In summation regarding attorney fees and expenses, the posture of the case at bar is such that all parties involved were to some extent at fault. All parties had the opportunity to settle, but chose to litigate. Each party defended only its own interests and asserted only its own claims and defenses. Consequently, the Court feels and so rules, that each party-litigant bear its own attorney fees and expenses.

Tube-O-Matic

131. Manhattan incurred an indebtedness to Tube-O-Matic, Inc. for the work and material on the Providence Hospital job to be provided or furnished by Tube-O-Matic, Inc. Ernst performed certain work installing or working with the Tube-O-Matic company for which Tube-O-Matic has not paid Ernst. By agreement at the request of Ernst and with the permission and concurrence of Tube-O-Matic (EX 527), Manhattan was directed to pay that amount of $11,265.23 to Ernst to which no exception has been taken. Manhattan's accountant, Groth, testified that the books showed that an amount had been held and was due on the Tube-O-Matic account (Tr. 5443), although his version of that amount was $10,212.36. By virtue of the agreement whereby Manhattan advised that it did have enough money due Tube-O-Matic to satisfy the Ernst account and that that money be kept pending Ernst's final estimate (EX 527), and the agreement by Tube-O-Matic (EX 527) consenting to such payment, and bearing in mind the rights Ernst otherwise would have had (but did not pursue, in view of this arrangement) to attempt to insure payment from Tube-O-Matic by either lien rights or action under the payment bond furnished by Manhattan to guarantee that all bills of all subcontractors, suppliers and laborers would be paid, Ernst is entitled to be paid from the fund held by Manhattan in the sum of $11,265.23.

CONCLUSIONS OF LAW

On the basis of the foregoing facts, the Court makes the following Conclusions of Law:

1. The Court has jurisdiction over all the parties and subject matter of this litigation under the Statutes of the United States by reason of diversity of citizenship among the parties and the amount in controversy.

2. The Court has attempted to adjudicate all issues raised by the pleadings, pretrial order, and all issues as presented by the evidence, and the pleadings are deemed amended to encompass all such issues. No judgment is issued against any party on a claim on which said party did not have a complete and fair opportunity to present.

[16] 3. The construction contract entered into between Manhattan and Providence provides for a payment by Manhattan to Providence of the sum of $250.00 per day for each day that completion of the project was delayed beyond the date specified in the contract. The delays and the parties responsible therefor have heretofore been determined as set out in the Findings of Fact. The agreement of Providence and Manhattan upon the sum of $250.00 per day for each day of delay is reasonable and binding upon them. (That agreement fixes and limits the right of Providence to recover damages for failure to complete the project within the time specified.)

4. Providence had the right under the construction contract to require Manhattan to perform the renovation of the existing building at times acceptable to Providence. Having the right to schedule the work Providence was required by law and in equity to schedule such work in a reasonable manner with due regard to their responsibility to the public to keep its hospital facilities operational during the carrying out of the contract. This they did, except as hereinafter referred to in Conclusion of Law No. 5.

[17] 5. As heretofore found, Providence, due to its handling of the sewage ejection problem, is charged with 65 days delay in the ultimate completion of the contract and the same is true of its and McCauley's handling of the Palco lighting fixture situation in the amount of 59 days and the releasing of space in the old building in the amount of 39 days. Therefore, Providence cannot recover from Manhattan liquidated damages for these periods.

6. As stated in Findings of Fact No. 2 hereinabove, all valid issues raised by the pleadings, pretrial order and the evidence have been treated in this order. The question of whether or not Providence owes McCauley any balance under its contract was not raised. As shown in the Findings of Fact, supra, the Court has found that Providence is entitled to a judgment against McCauley for damages to Providence as a result of McCauley's inefficiencies. This is exclusive of any amount which Providence may owe McCauley under the contract.

7. No award is made to any party for indemnity for attorney fees and expenses for the reasons heretofore set out. Additionally the Court feels that the great majority of fee time and expenses were necessitated in the preparation and presentation of affirmative claims against the various litigants and was not in defense of any claim being asserted against the particular litigant. It would be simply a speculative attempt to allocate that portion of the fee and expenses attributable to merely defensive matters.

[18] 8. During the litigation the contention was made by Providence that Manhattan's claim should be held in abeyance or denied because of failure to resort to arbitration. Providence's entitlement to arbitration is permissive and cannot operate to deny to a party its right to present its claim in a court of law. A litigant cannot fail to invoke permissive arbitration provisions of a contract and then attempt to advance this failure as a defense to claims asserted against it.

[19] 9. Fairbanks-Morse has asserted defensively that the claims for punitive damages of Manhattan, Ernst and McCauley on the grounds of fraud are barred by the Statutes of Limitations for the State of Alabama. The applicable statute requires that claims based upon fraud must be filed within one year after the alleged fraud was actually or should have been discovered by the claimant. Fairbanks-Morse urges that all parties should have been made aware of this deception, if any there was, by the evidence presented on the hearing as to the sufficiency of the generator units in January and February 1971. The Court finds that the claim for fraud is not barred by the Statute as the more flagrant facets of this came out in discovery within only months prior to the commencement of the hearing on its merits.

[20] 10. When misrepresentation and fraud have been established by clear, cogent and convincing evidence, it is ap-

propriate and proper for the Court to award not only actual damage caused thereby, but also punitive damages in an appropriate amount.

11. Damages actual and punitive as found above will be awarded by the Court in favor of and against the respective parties.

12. On October 2, 1973, as shown on Page 5605 of the transcript, oral motions were made by Ernst, Fairbanks-Morse and Providence to dismiss all of Manhattan's claims against these litigants. These motions were carried along with the case in chief and are now denied by the Court.

13. Any claims arising from the pleadings, counterclaims, cross-claims or pretrial order, to which the Court has not specifically addressed itself in this Findings of Fact and Conclusions of Law, are hereby denied.

A Judgment will forthwith be entered in accordance with the above Findings of Fact and Conclusions of Law.

JUDGMENT

This cause having come on for final hearing on the pleadings and proof of the respective parties and having been taken under submission and the Court after due deliberation having now entered the Findings of Fact and Conclusions of Law, it appears unto the Court as follows:

1. That, as between Providence Hospital (Providence) and Manhattan Construction Company of Texas (Manhattan), the original contract price for the entire project was $6,117,500.00. As a result of Change Orders 1-12 in the total amount of $101,876.64, the revised contract price was $6,219,376.64. Payments made by Providence to Manhattan through May, 1972, totalled $5,887,576.80, leaving a balance of $331,799.84. Pursuant to an order of this Court on the 27th day of July 1972, Providence paid Manhattan an additional $211,473.79. Thus, the unpaid balance due by Providence to Manhattan on the contract is $120,326.05. In turn, however, pursuant to its contract, Manhattan is liable to Providence in liquidated damages for 248½ days of delay in the ultimate completion of the project. This total of 248½ results from 108 days of delay caused by Manhattan's subcontractor, E. C. Ernst, Inc. (Ernst), in regard to the explosion-proof receptacles, 80½ days of delay caused by Ernst's subcontractor, Fairbanks-Morse, Inc. (Fairbanks-Morse), in regard to the emergency generator system and 60 days of delay caused by Manhattan's failure to properly supervise the construction project. When computed at the rate of $250.00 per day in accordance with the liquidated damages provision of the contract, the liquidated damages for which Manhattan is liable to Providence total $62,125.00. Therefore, after subtracting the liquidated damages from the balance yet due on the contract price, Providence is liable to Manhattan for a total of $58,201.05.

2. That, as between Manhattan and Ernst, the original contract price for the electrical work to be performed by Ernst, including the purchase and installation of the emergency generator system, was $982,215.00. Pursuant to a change of $333.00, the revised contract price was $982,548.00. Towards this revised contract price, Manhattan has made payments to Ernst of $898,648.00, leaving a balance of $83,900.00 from the revised contract price. In addition, Manhattan is liable to Ernst for $11,265.23 in regard to the Tube-O-Matic novation. However, Ernst is liable to Manhattan for damages sustained by Manhattan in the purchase and installation of the emergency generator system. Those damages total $150,637.12 and Manhattan shall back charge this amount against the revised contract price and recover any excess from Ernst. In addition, pursuant to their contract, Ernst is liable to Manhattan in liquidated damages for 188½ days of delay in the completion of the project. This total of 188½ days results

from 108 days of delay caused by Ernst in regard to the explosion-proof receptacles and 80½ days of delay caused by Ernst's subcontractor, Fairbanks-Morse, in regard to the emergency generator system. When computed at the rate of $250.00 per day in accordance with the liquidated damages provision of the contract, the liquidated damages for which Ernst is liable to Manhattan total $47,125.00. Therefore, as the result of the above matters, Ernst is liable to Manhattan in the total amount of $102,596.89.

3. That Fairbanks-Morse is liable to Ernst for $61,626.12 for damages sustained by Ernst as a result of Fairbanks-Morse's breach of their contract for the purchase of the emergency generator system and for $20,125.00 in liquidated damages resulting from 80½ days of delay of the completion of the project which was caused by Fairbanks-Morse's aforesaid breach and which should be computed at the rate of $250.00 per day in accordance with their contract. Additionally, Fairbanks-Morse is liable to Ernst in the amount of $20,000.00 in punitive damages because of fraud committed by Fairbanks-Morse upon Ernst with regard to the emergency generator system. Therefore, Fairbanks-Morse is liable to Ernst in the total amount of $101,751.12.

4. That Fairbanks-Morse is liable to Manhattan in the amount of $20,000.00 in punitive damages because of fraud committed by Fairbanks-Morse upon Manhattan with regard to the emergency generator system.

5. That, as between Providence and Charles H. McCauley Associates, Inc. (McCauley), McCauley is liable to Providence for damages arising from delays caused by McCauley in the ultimate completion of the project. Such delays were for 29½ days in regard to the patient bed light fixtures and 80½ days in regard to the emergency generator system, for a total of 110 days of delay. Damages for said delays should be awarded at the rate of $250.00 per day for a total of $27,500.00.

Therefore, it is hereby ordered, adjudged and decreed by the Court that judgments in the following amount and for and against the following parties are hereby entered, to wit:

1. In favor of Manhattan Construction Company of Texas and against Providence Hospital in the amount of fifty-eight thousand two hundred one dollars and five cents ($58,201.05);

2. In favor of Manhattan Construction Company of Texas and against E. C. Ernst, Inc., in the amount of one hundred two thousand five hundred ninety-six dollars and eighty-nine cents ($102,596.89);

3. In favor of E. C. Ernst, Inc. and against Fairbanks-Morse, Inc., in the amount of one hundred one thousand seven hundred fifty-one dollars and twelve cents ($101,751.12);

4. In favor of Manhattan Construction Company of Texas and against Fairbanks-Morse, Inc. in the amount of twenty thousand dollars ($20,000.00);

5. In favor of Providence Hospital and against Charles H. McCauley Associates, Inc., in the amount of twenty-seven thousand five hundred dollars ($27,500.00).

It is further ordered and adjudged that each party bear its own costs of court.

EXCERPT FROM

BRIEF IN SUPPORT OF THE MOTIONS OF PROVIDENCE HOSPITAL TO DISMISS AND TO STAY

* * *

The gravaman of Manhattan's claim for damages against Providence is alleged "lengthy delays . . . caused by the failure of . . . McCauley . . . to properly and promptly act upon data . . . submitted" by Ernst through McCauley "with respect to the emergency generator system." (Manhattan crossclaim page 2)

The Providence — Manhattan agreement specifically provided an administrative remedy to Manhattan in the event McCauley failed to act promptly on the submission of data pertaining to the emergency generator. Paragraph 6(c) of the General Conditions of the Providence — Manhattan contract in part provides:

> If the architect fails to make a written decision or written interpretation of the contract requirements on any question within ten days after written request for the same by either party to the contract, either party may then demand arbitration . . . (Providence motion to dismiss, Exhibit A page 2)

Paragraph 6(c) of the General Conditions provided the parties with a contractual method of immediately resolving the dispute pertaining to whether or not the

proposed Fairbanks Morse generator met the specifications. Had Manhattan followed the procedure established by the contract, Manhattan would have obtained an immediate decision as to whether the Fairbanks Morse generator did or did not comply with the specifications and would have suffered no damages because of the alleged long delay in McCauley rendering a decision. In *United States v. Blair*, 321 U.S. 730, 88 L ed. 1039, the contract between the United States and Blair provided that "all disputes 'concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department'." In dismissing the claim of Blair against the United States for delays caused by the United States, the Supreme Court held that the contract

> procedure provided a complete and reasonable means of correcting the abuses alleged in this case . . . furthermore, (the contract procedure) provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims.

* * *

> Even if the conduct of the Government superintendent or contracting officer, or their assistants, was so flagrantly unreasonable or so grossly erroneous as to imply bad faith, the appeal provisions of the contract must be exhausted before relief is sought in the courts.

Here, as in Blair, the contractor could have avoided all alleged damages due to the failure of Providence through its architect to rule on the sufficiency of the Fairbanks Morse generator under the specifications by demanding an immediate decision and if dissatisfied with the decision, demanding arbitration in accordance with paragraph 6(c) of the General Conditions of the contract and having failed to do so, the "court is then obligated to outlaw his claims, whatever may be their equity. To do otherwise is to rewrite the contract." *United States v. Holpuch*, 328 U.S. 234, 240, 90 L. ed 1192, 1196.

Moreover, the Providence — Manhattan contract makes provisions for equitable adjustment for "delays in the completion of the work due to . . . acts of the owner" by providing that "the architect . . . shall ascertain . . . the extent of the delay and extend the time for completing the work." (General Conditions, paragraph 31(c), Exhibit A page 6) In *United States v. Rice*, 317 U.S. 61, 87 L ed. 53, the Court held where, as here, a construction contract provides for an extension of time because of delay occasioned by the owner, that the contractor had no right to collect damages but only a right to have the completion date of his contract extended and relief from liquidated damages for failure to complete the contract on the date originally specified.

Dated at Mobile, Alabama this 17th day of December 1970.

Louis GERMANY, Plaintiff,
v.
The RIVER TERMINAL RAILWAY COMPANY, Defendant-Appellant,
and
Norfolk & Western Railway Company, Defendant-Cross-Claimant-Appellee.
No. 72-2095.

United States Court of Appeals, Sixth Circuit.

Argued April 2, 1973.

Decided April 24, 1973.

Action by railroad employee against employer railroad and railroad which owned defective railroad car which caused employee's injury. Railroad which owned car filed cross claim against employer railroad. The United States District Court for the Northern District of Ohio, Eastern Division, Robert B. Krupansky, J., entered judgment and employer railroad appealed. The Court of Appeals held that where interchange agreement between employer railroad and railroad which owned defective car provided for compulsory arbitration in case of disagreement as to construction of interchange agreement and employer railroad had not waived right to arbitration and correct construction of the agreement would require understanding of railroad practices and terminology, trial court should not have proceeded to interpret the interchange agreement itself, and trial court would be directed to enter order requiring submission of issues in dispute to arbitration even though employer railroad on appeal sought to abandon its request for arbitration in interest of concluding dispute as rapidly as possible.

Judgment vacated and cause remanded.

1. Arbitration and Award ⇐1

The Federal Arbitration Act favors the submission of disputes to arbitration in accordance with the intentions of the parties to an agreement as a means of easing court congestion. 9 U.S.C.A. § 1 et seq.

2. Contracts ⇐290

An agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon.

3. Contracts ⇐290

Waiver of agreement to arbitrate may not be inferred from fact that party does not rely exclusively on the arbitration provisions of a contract, but attempts to meet all issues raised in litigation between it and another party to the agreement.

4. Contracts ⇐290

Where arbitration provisions of interchange agreement between employer railroad and railroad which owned defective car which injured employee were

to disregard the question asked of counsel, not to place any significance on it, and I would ask that a mistrial be declared.

MR. GILDEN: [Attorney for two other codefendants] I will join in that.

specifically cited by employer railroad in a tendered amendment to a pleading in support of its position that cross claim of railroad which owned car failed to state claim upon which relief could be granted, there was no waiver by employer railroad of arbitration provision and district court should not have proceeded to interpret the interchange agreement itself. 9 U.S.C.A. § 1 et seq.

5. Contracts ⇐292½

Even though employer railroad on appeal sought to abandon its request for arbitration pursuant to interchange agreement between employer railroad and railroad which owned car which caused injury to employee, inasmuch as correct construction of interchange agreement involved would require understanding of railroad practices and terminology, district court would be directed to enter order requiring submission of issues in dispute to arbitration. 9 U.S.C.A. § 1 et seq.

Dennis M. Kelly, Cleveland, Ohio, for appellant; George J. Moscarino, Dennis M. Kelly, Kenneth F. Seminatore, Jones, Day, Cockley & Reavis, Cleveland, Ohio, on brief.

Byron D. Fair, Cleveland, Ohio, for appellee; Byron D. Fair, Thomas V. Chema, Arter & Hadden, Cleveland, Ohio, on brief.

Before PECK, McCREE and LIVELY, Circuit Judges.

PER CURIAM.

This case involves an interchange agreement between two railroads. Louis Germany, who is not a party to the appeal, sued The River Terminal Railway (RTR), his employer, and the Norfolk & Western Railway Company (N&W). He recovered a judgment against RTR for injuries caused by a defect in a railroad car of N&W which was under the control of RTR.

In a cross-claim against RTR, the interchange agreement was filed as an exhibit and relied upon by N&W. By a later pleading, RTR, relying on the same agreement, sought to recover one-half the verdict as well as one-half of all costs from N&W. Section 8 of that agreement provided for compulsory arbitration "[I]n case of any disagreement between the parties hereto as to the true construction or meaning of any of the provisions of this agreement, or as to the rights of either party hereunder, or as to any claim arising hereunder . . . ." The arbitration provisions of the agreement were specifically cited by RTR in a tendered amendment to a pleading in support of its position that the cross-claim of N&W failed to state a claim upon which relief could be granted.

The trial court refused to permit the filing of the amended pleading which set up the arbitration provisions of the agreement and proceeded to interpret the agreement itself.

[1-3] The Federal Arbitration Act (9 U.S.C. § 1 et seq.) favors the submission of disputes to arbitration in accordance with the intentions of the parties to an agreement as a means of easing court congestion. Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711 (7th Cir. 1967). An agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon. Burton-Dixie Corp. v. Timothy McCarthy Construction Co., 436 F.2d 405 (5th Cir. 1971). However, waiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of a contract, but attempts to meet all issues raised in litigation between it and another party to the agreement. General Guaranty Insurance Co. v. New Orleans General Agency, Inc., 427 F.2d 924 (5th Cir. 1970).

[4] The District Judge made no finding on the issue of the right of RTR to have the dispute between it and N&W decided by arbitration. Our review of the record convinces us there was no waiver by RTR in the district court proceedings. On appeal RTR has sought to abandon its request for arbitration "in the interest of concluding this dispute as rapidly as possible." However, the courts are concerned that the salutary results of the policy expressed in the Federal Arbitration Act be realized.

[5] The correct construction of the interchange agreement involved here will necessarily require an understanding of railroad practices and terminology. This can best be achieved by persons familiar with the industry.

The judgment of the district court is vacated and the cause remanded for entry of an order requiring RTR and N&W to submit the issues in dispute to arbitration.

BURGESS CONSTRUCTION COMPANY, an Alaska Corporation, Plaintiff-Appellee,

v.

M. MORRIN & SON COMPANY, INC., a Utah Corporation, and General Insurance Company of America, an insurance company, Defendants-Appellants.

U. S. for the Use and Benefit of M. MORRIN & SON COMPANY, INC., a Utah Corporation, Plaintiff-Appellant,

v.

BURGESS CONSTRUCTION COMPANY, an Alaska Corporation, and General Insurance Company of America, a corporation, Defendants-Appellees.

No. 74-1701.

United States Court of Appeals, Tenth Circuit.

Argued May 21, 1975.

Decided Nov. 10, 1975.

Rehearing Denied Jan. 14, 1976.

General contractor on government dam project brought action to enforce its right to take over concrete subcontractor's work and to recover damages for the latter's failure to complete its performance on time. The subcontractor commenced a separate action under the Miller Act alleging that the general contractor breached the agreement by delaying access to work site and wrongfully terminating subcontractor. The actions were consolidated. The United States District Court for the District of Utah, Willis W. Ritter, Chief Judge, rendered judgment for the general contractor, and subcontractor appealed. The Court of Appeals, Hill, Circuit Judge, held that use of words "must be" in provision of subcontract governing time of performance did not create an unconditional obligation on part of contractor to complete the work necessary for subcontractor's site access on the stated dates, that general contractor was not in breach of implied promise that it would do nothing to hinder or prevent subcontractor's performance and that general contractor was justified in exercising its right to terminate subcontractor and take over remainder of work and that it was not error to include an amount for overhead in computing general contractor's damages.

Affirmed.

1. Contracts ⇐198(4)

Subcontract to furnish concrete work on government dam project was to be interpreted as a whole in determining whether general contractor had an unconditional obligation to complete work necessary for site access on dates set forth in provision governing time of performance; court could not merely look to words which the subcontractor, alleging a breach by the general contractor, chose to emphasize.

2. Contracts ⇐218

Words "subject to" usually indicate a condition of one party's duty of performance and not a promise by the other.

See publication Words and Phrases for other judicial constructions and definitions.

3. Contracts ⇐218

Under provision of subcontract for concrete work on government dam project that concrete in lower tunnel, stilling basin and lower trash rack "shall be" completed to allow diversion of river through tunnel on or before 1 August 1971 "subject to" requirement that certain work "must be" done by specified dates but that subcontractor was entitled to a time extension equal to any delay, promises by general contractor to complete described work by specified dates were in nature of conditions rather than independent covenants or unconditional obligations to complete work necessary for site access on the stated dates. Miller Act, § 2, 40 U.S.C.A. § 270b.

4. Contracts ⇐299(2)

Although a general contractor may not be absolutely bound by contract to provide site access to a subcontractor on specified date, the general contractor may still be liable for damages caused by delay when there is no unqualified warranty or express covenant to provide site access at a definite time.

5. Courts ⇐361(4)

In federal cases involving suits on a prime contract by a contractor against the government, federal law controls; however, law to be applied in suits on subcontracts is not so clear. Miller Act, § 2, 40 U.S.C.A. § 270b.

6. United States ⇐70(4)

Although administrative regulations governing required clauses in government contract provide for equitable adjustments to the contract in administrative proceedings, such regulations did not change the law of contracts in suits seeking judicial relief for breach of contract; in any event, regulations were not controlling where dispute did not involve the standard form clauses but was over a clause drawn and added to the contract by the parties.

7. Contracts ⇐299(1)

Unreasonable delay is a breach of implied obligation not to hinder or delay the other party's performance, in the absence of a contract clause contemplating and excusing the delay.

8. Contracts ⇐299(1)

An extension of time clause does not necessarily provide an exemption from damages for delay.

9. Contracts ⇐299(2)

Finding that it was not the intent of the parties to subcontract to provide concrete work for government dam project to bind general contractor which had agreed to complete certain work by specified dates but which also agreed that subcontractor would be entitled to a time extension equal to any delay, to pay damages should delay of the type encountered actually occur and, hence, that delay was contemplated by subcontract and that general contractor was not liable for damages caused thereby was not clearly erroneous. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.; Miller Act, § 2, 40 U.S.C.A. § 270b.

10. Contracts ⇐299(2)

Even if contractually authorized extension of time was not sole remedy for general contractor's delay in providing concrete subcontractor access to government dam project, general contractor was not liable to subcontractor in damages absent showing that the delay was unreasonable or due to general contractor's fault. Miller Act, § 2, 40 U.S.C.A. § 270b.

11. Contracts ⇐299(1)

Breach of an implied promise not to hinder or delay other party's performance is not established merely by proving that there was delay; the delay must be unnecessary, unreasonable or due to defendant's fault.

12. Contracts ⇐217

Contract provision giving general contractor the right to terminate should concrete subcontractor fail to comply with the time of performance provisions of the agreement was valid.

13. Contracts ⇐312(1)

General contractor on government dam contract was not guilty of breach of

concrete subcontract in terminating subcontractor and taking over remainder of work where subcontract gave general contractor such right and there was substantial evidence confirming fact that subcontractor was not able to complete performance on time and that general contractor was justified in exercising his power of termination. Miller Act, § 2, 40 U.S.C.A. § 270b.

14. Courts ⇐406.3(15)

In determining whether district court's findings of fact in breach of contract action were clearly erroneous Court of Appeals was required to look at the entire record, rather than only at appellant's evidence. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

15. Courts ⇐406.6(11)

Any error in findings that extra work imposed on concrete subcontractor on government dam contract was insignificant and that schedule changes made by general contractor did not prevent subcontractor from timely completing its work could not be a basis for reversal of determination that general contractor was not in breach of agreement since schedule of operations set forth in contract was for convenience of all contracts in coordinating work and general contractor did not guaranty that concrete subcontractor would be allowed to work in the sequence it proposed but, on the contrary, general contractor retained right to direct order of subcontractor's performance in manner necessary to completion of the project as a whole. Miller Act, § 2, 40 U.S.C.A. § 270b.

16. Damages ⇐120(2)

Computing general contractor's damages for cost of completing concrete subcontractor's work by allocating a percentage of the former's total overhead to the work completed on the subcontract was proper, as against contention that there was no proof that the extra work actually increased general contractor's overhead or, if it did, in what amount, where under circumstances such was the best measure available.

17. Damages ⇐120(1)

Overhead is a proper element of cost of completion damages and an allocation is a proper measure of the amount.

Robert J. McNichols and Patrick A. Sullivan, Spokane, Wash., for appellants M. Morrin & Son Co., Inc., and Gen. Ins. Co. of America.

David K. Watkiss, Salt Lake City, Utah, for appellees Burgess Const. Co. and Gen. Ins. Co. of America.

Before HILL, SETH and HOLLOWAY, Circuit Judges.

HILL, Circuit Judge.

This litigation arose from the Bureau of Reclamation Soldier Creek Dam project. The appellee, Burgess Construction Company (hereinafter referred to as Burgess), was the prime contractor, and the appellant, M. Morrin & Son Company, Inc. (hereinafter referred to as Morrin), was the concrete subcontractor. Delays in the completion of the subcontract work led to a termination and take-over of Morrin's work by Burgess. Burgess then instituted an action to enforce its right to take over Morrin's work and to recover damages for Morrin's failure to complete its performance on time. Morrin commenced a separate action under the Miller Act[1] alleging Burgess breached the subcontract by delaying Morrin's access to work sites and by wrongfully terminating the subcontract. The actions were consolidated and tried to the court without a jury. General Insurance Company of America, the surety of both parties, was a codefendant in each case but did not actively participate in the litigation.

At the trial, the court entered judgment for Morrin, and findings of fact and conclusions of law consistent therewith, at the close of the evidence. Argument of the case was deferred until post-trial motions by Burgess were heard. After the parties had submitted briefs and argued the motions, the court set aside the prior judgment and entered new findings of fact and conclusions of law. Judgment was entered for Burgess in the amount of $680,345.88 plus interest. Morrin has appealed.

1. 40 U.S.C. § 270b authorizes such suits in federal court on a government contractor's bond.

The facts are complicated and continue to be disputed on appeal. In October, 1970, Burgess was awarded the contract for the construction of a large earthen dam on Soldier Creek, approximately 80 miles east of Salt Lake City, Utah. Thereafter, Morrin and Burgess entered into negotiations culminating in the execution of a subcontract under which Morrin was to do certain concrete work on the project.

While Burgess conducted the earth-moving operations for building the dam, the river had to be diverted through tunnels. The relevant portions of the Morrin-Burgess subcontract called for Morrin to do the concrete work necessary to allow diversion through what was known as the lower tunnel. The factual dispute involves primarily the work on the lower inlet tunnel, the lower outlet tunnel, the gate chamber, and the stilling basin. The lower inlet tunnel is a circular concrete tunnel six feet in diameter and 750 feet long. The lower outlet tunnel is in the shape of an inverted U. It is eight feet high and 800 feet long. Between the inlet and outlet tunnels is the gate chamber a large, cavernous area 36 feet high and 30 feet long. It contains steel tunnel liners and hydraulic gates which can be raised or lowered to control the flow of the river. The stilling basin is an above-ground structure resembling a large concrete building. Its purpose is to absorb the force and turbulence as the water flows out of the tunnels. Burgess also subcontracted other aspects of the diversion work, including the excavation and the fabrication, delivery and installation of the steel liners and gates.

The issues presented in this appeal relate to the obligations of the parties under the time of performance provisions of the subcontract. Burgess' successful bid was based on its plan to finish construction in two years, even though its contract with the Bureau of Reclamation allowed over three years. Completion within this time frame required diversion of the river before the spring of 1972. This fact was discussed by the parties during contract negotiations and is reflected in the time for completion stated in the subcontract. Morrin was obligated to complete the work here in question by August 1, 1971, with extensions of time equal to any delay in gaining access to the work sites on specified dates.

After the execution of the subcontract, Morrin submitted a schedule to Burgess showing its planned sequence of operation. Morrin planned to work first in the lower inlet tunnel, beginning at the gate chamber and moving outward to the tunnel entrance. The second sequence of operations was the contemporaneous installation of the lower outlet tunnel and the gate chamber. The stilling basin was scheduled for continuous work by a separate crew beginning at the same time as the lower outlet tunnel and gate chamber. Morrin planned to utilize a small railway system to transport both the concrete and the pump, so that no concrete would have to be pumped in from the entrance to the tunnels. Morrin contemplated laying track once into the lower inlet tunnel and once into the lower outlet tunnel, thereby allowing placement of the gate chamber while the railroad was installed in the lower outlet tunnel.

Because of delays in gaining access to work areas, Morrin was required to work first in the stilling basin, second in the lower outlet tunnel, third on the lower inlet tunnel, and fourth in the gate chamber. Instead of installing the railroad twice, Morrin had to install it five times. The extent of delay in each work area is set out below.

LOWER OUTLET TUNNEL. The excavation was to be completed by April 1, 1971. Morrin was able to commence some work in the area on May 18, but

the excavation was not fully completed until June 21, 1971. Morrin completed this work on October 28, requiring over 100 working days instead of the 48 its schedule predicted.

LOWER INLET TUNNEL. This area was likewise to be fully excavated to give Morrin access by April 1, 1971. There is evidence in the record that it was accessible in July and that Burgess requested work be commenced at that time. Morrin did not begin pouring concrete until November.

GATE CHAMBER. The gates and steel tunnel liners were to be delivered by May 15, 1971, and installed by June 1. They were a prerequisite to Morrin's work in the gate chamber because they required embedments in the concrete. The fabricator experienced difficulty in obtaining the type of steel necessary for the liners and did not complete delivery until September 18, 1971. Installation of the gates and liners was not finished until December 26, more than six months beyond the date anticipated in the contract.

THE STILLING BASIN. Morrin scheduled its work here to begin on May 10, 1971, and end on July 17. Work was actually commenced on April 26 and completed in December. A portion of the area was left unexcavated until September 1.

As a result of the delays, Morrin was forced to continue working into the winter months when temperatures dropped as low as –40 degrees. Morrin failed to progress as Burgess felt it should, and on January 17, 1972, Burgess gave notice of its intention to terminate Morrin and prosecute the work itself with Morrin's equipment. Such action was authorized by the subcontract for failure to perform on time. On January 21, 1972, Burgess began the remainder of Morrin's work and completed it in May.

Summarizing the evidence and contentions of each party, Morrin contends Burgess was bound by the contract to make work sites available to Morrin on specified dates and is liable for damages resulting from its failure to do so. Morrin argues its inability to complete performance on time was due solely to delays caused by other subcontractors and attributable to Burgess. Morrin's witnesses indicated it spent over 700 work hours removing rock protrusions and muck left in the tunnels by the excavator in violation of the subcontract terms. Morrin's evidence further indicated that changes in the sequence of its work made timely performance impossible and substantially increased its costs. It also contends winter work was not contemplated when the contract was made, and that winter weather conditions further added to the time and cost of its performance.

Burgess contends it was not bound to make work sites available on any certain date or in a certain order. It contends the dates mentioned in the subcontract were stated as conditions to Morrin's duty to perform by the date set in the subcontract. Burgess' evidence indicates Morrin's inability to perform on time was caused by its inefficiency. Remedial work for correcting errors, inadequate crews, and inadequate work shifts were among the reasons given by Burgess' witnesses for Morrin's delay. There was evidence that the tunnels had been checked for rock protrusions and approved, and any extra work in this regard would have been insignificant. An expert in this type of construction testified that Morrin should have been able to complete work on time notwithstanding the schedule changes. He did not consider it necessary to work in the sequence Morrin planned. Burgess' evidence also indicated winter work was contemplated when the contract was entered, and winter work did not materially change the nature of Morrin's performance.

The fundamental issue in this appeal is whether Burgess was contractually bound to give Morrin access to work sites on the dates stated in the contract. If it was, Burgess breached the contract and the judgment must be reversed. Morrin argues first that Burgess breached an express covenant to provide access on time. The relevant contract clauses state:

> SECTION 4 TIME OF PERFORMANCE. The Subcontractor agrees to keep himself informed as to the progress of the project and to faithfully prosecute his work, and the several parts thereof, at such times in such order as the Contractor considers necessary to keep the same sufficiently in advance of the other parts of the project and to avoid any delay in the completion of the construction as a whole. The scheduled TIME OF PERFORMANCE of the work forming a part of this Subcontract is *See Exhibit B.*

The text of Exhibit B reads:

> Time for completion of this work shall be as follows:
>
> 1. Concrete in lower tunnel, stilling basins and lower trash rack shall be complete to allow diversion of river through tunnel on or before 1 August 1971 *subject to*:
>
> a. Lower tunnel excavation *must be* complete to allow access from both ends by 1 April 1971.
>
> b. Excavation for lower tunnel chute and the stilling basins for both chutes *must be* completed by 1 April 1971.
>
> c. Gates and steel liners for lower gate chamber *must be* delivered on or before 15 May 1971 and installed not later than 1 June 1971.
>
> The subcontractor will be entitled to a time extension equal to any delay created by a, b or c above. (emphasis added)

[1-3] Morrin argues the use of the words "must be" creates an unconditional obligation by Burgess to complete the work necessary for site access on the stated dates. However, we cannot look only to the words Morrin chooses to emphasize; we must interpret the contract as a whole. 3 Corbin on Contracts § 549 (1960). Clause 1 of Exhibit B is a promise by Morrin to complete its work by August 1, 1971, "subject to" the work necessary for site access being completed at times stated in a, b and c. The words "subject to" usually indicate a condition to one party's duty of performance and not a promise by the other. 17 Am. Jur.2d *Contracts* § 320 (1964). The structure of Exhibit B, clause 1, in its entirety also indicates that subparts a, b and c are not independent covenants, but are conditions. The inferior position of the alleged promises by Burgess indicates the parties did not consider them independent obligations of the same import as the obligation clearly assumed by Morrin in the primary clause. This interpretation is in harmony with Section 4 of the form contract of which Exhibit B is made a part. In Section 4 Burgess expressly reserves the right to direct the time and order of Morrin's performance. We do not find an expression of intent in Exhibit B to bind Burgess otherwise. The record shows that delay is not unusual in construction projects of this magnitude. The provision for extending Morrin's time in the event of delay by Burgess indicates this possibility was contemplated by the parties when the contract was made. In view of the wording and structure of the contract clause and the surrounding circumstances, we do not believe the parties intended to bind Burgess absolutely to provide site access on the specified dates. Rather, we agree with the trial court that this clause states conditions to Morrin's duty to complete its performance at the time stated in the subcontract.

[4-7] A contracting party may still be liable for damages caused by delay when there is no unqualified warranty or express covenant to provide site access at a definite time. Morrin argues that under the rule of *George A. Fuller Co. v. United States*, 69 F.Supp. 409, 108 Ct.Cl. 70 (1947), Burgess has breached an implied promise it would do nothing to hinder or prevent Morrin's performance. Burgess relies primarily on *United*

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States v. Howard P. Foley Co., 329 U.S. 64, 67 S.Ct. 154, 91 L.Ed. 44 (1946),[2] where the Supreme Court held an extension of time clause similar to the one in the present case provided the injured contractor's sole remedy. Morrin treats these cases as stating two separate rules and even argues *Foley* is no longer good authority.[3] However, subsequent cases have harmonized *Fuller* and *Foley*. Both cases are based on the rule that unreasonable delay is a breach of an implied obligation not to hinder or delay the other party's performance, in the absence of a contract clause contemplating and excusing the delay.[4] The court in *L. L. Hall Construction Co. v. United States*, 379 F.2d 559, 563, 177 Ct.Cl. 870 (1966), stated that in cases under this rule:

> the questions on which liability turns . . . are whether defendant was the cause of the delays here, whether it failed to use reasonable diligence and good faith in performance of its responsibilities under the contract, and whether the contract contemplated and excused the delays.

[8, 9] First, we consider whether the delays which occurred were contemplated and excused by the subcontract. It provides: "The subcontractor will be entitled to a time extension equal to any delay created by a, b or c above." An extension of time clause alone does not necessarily provide an exemption from damages for delay, but:

> It may, in conjunction with other facts, indicate, as it was held in the Foley case, that the . . . [defendant] did not obligate itself to provide materials or a site or to complete certain work by a certain time. In such cases it is a reasonable construction of the contract that delays in doing these things were anticipated and fully provided for by the provision for an extension of time.

Kehm Corp. v. United States, 97 F.Supp. 620, 119 Ct.Cl. 454 (1950).[5] Whether there were "other facts" indicating Burgess was not obligated to provide the work sites at any certain time and not subject to the imposition of damages for delay is largely a question of fact for the trial court. Although the evidence is not overwhelming on this point, Burgess introduced evidence that it was not the intent of the parties to bind Burgess to pay damages should delay of the type encountered actually occur. It was not clearly erroneous[6] for the trial court to base its decision on this evidence rather than Morrin's evidence to the contrary. Therefore, we affirm the trial court's holding that the delay was contemplated by the subcontract, and that Burgess is not liable for damages caused by the delay.

[10, 11] Even if we decided the extension of time was not the sole remedy, Morrin still could not recover. Breach of an implied promise not to hinder or delay the other party's performance is not established merely by proving there was delay. The delay must be unnecessary, unreasonable or due to defendant's fault. *Broome Construction, Inc. v. United States*, 492 F.2d 829, 203 Ct.Cl. 521 (1974).[7] There is no contention that Burgess acted in bad faith. On the contrary, Morrin took the position that the reason or necessity for the delay was immaterial. When Burgess' counsel sought to examine a witness concerning the reason for delay in obtaining the steel for the gates and tunnel liners, Morrin objected. Its counsel stated, "I don't see any materiality of his difficulty in obtaining steel. . . . As far as we were concerned, there was a certain time it was supposed to be there, and where he got it and what difficulty he had is immaterial to this case. . . ." The objection was sustained.

Nevertheless, testimony was admitted indicating Burgess acted in good faith and its delay was not unreasonable or due to its fault. This testimony was admitted on issues primarily relating to whether Morrin's inability to complete its work on time was due to Burgess' delay or its own inefficiency. We do not attribute perfection to Burgess. However, neither do we find the type of delay by Burgess that constitutes a breach of an implied promise not to hinder or delay the subcontractor.

[12, 13] We must now determine whether Burgess breached the subcontract by terminating Morrin and taking over the remainder of its work. Morrin does not question the validity of the termination clause which gave Burgess the right to terminate should Morrin fail to comply with the time of performance provisions of the subcontract.[8] Morrin's only argument in this regard is that the decision to terminate was based on inaccurate information concerning the cause of Morrin's inability to complete its work on time. However, there is substantial evidence in the record confirming that Morrin was not able to complete performance on time and that Burgess was justified in exercising its power of termination.[9] We find that Burgess complied

2. The parties have briefed this case relying primarily on federal cases involving suits on a prime contract by a contractor against the government. In such cases, federal law controls. The law to be applied in suits on subcontracts is not so clear. When the construction of the Miller Act is not in issue and the United States is not a party to the subcontract, some circuits have held state law controls. Other circuits have held federal law controls in all actions under the Miller Act. These cases are collected in *United States v. Western Cas. & Sur. Co.*, 498 F.2d 335, 338 n.4 (9th Cir. 1974). In a Miller Act action on a subcontract, the Supreme Court recently held that uniform rules of national application should control the awarding of attorney's fees. Whether the holding is limited to attorney's fees or extends the application of federal law to all Miller Act cases is not immediately clear. *F. D. Rich Co., Inc. v. United States*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974).

   We do not distinguish between state and federal law in this opinion because we find no conflict between our decision and the law of Utah as expressed in *Russell v. Bothwell & Swaner Co.*, 57 Utah 362, 194 P. 1109 (1920), *United States v. Western Cas. & Sur. Co.*, *supra*.

3. Morrin points out that because the result in *Foley* and its progenitors, *United States v. Rice*, 317 U.S. 61, 63 S.Ct. 120, 87 L.Ed. 53 (1942), and *H. E. Crook Co. v. United States*, 270 U.S. 4, 46 S.Ct. 184, 70 L.Ed. 438 (1926), was considered unjust, changes were made in the required clauses in government contracts. When the most recent changes were made in 41 C.F.R. § 1-7.601 *et seq.*, avoiding the adverse effects of the "Rice" doctrine was one of the expressed reasons. 32 Fed.Reg. 16269 (1967). These required clauses provide for equitable adjustments to the contract in administrative proceedings. They do not change the law of contracts in suits seeking judicial relief for breach of contract. *See United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966). As recently as *Broome Constr., Inc. v. United States*, 492 F.2d 829, 203 Ct.Cl. 521 (1974), the Court of Claims followed the *Foley* holding as a vital principle of law.

   In any event, this case does not involve the standard form clauses. The dispute is over a clause drawn and added to the contract by the parties.

4. Although not always expressed in exactly the same terms, we believe this rule has been consistently followed. *Broome Constr., Inc. v. United States*, 492 F.2d 829, 203 Ct.Cl. 521 (1974); *L. L. Hall Constr. Co. v. United States*, 379 F.2d 559, 177 Ct.Cl. 870 (1966); *Kehm v. United States*, 343 F.2d 349 (2d Cir. 1965); *Commerce Int'l Co. v. United States*, 338 F.2d 81, 167 Ct.Cl. 529 (1964); *Laburnum Constr. Corp. v. United States*, 325 F.2d 451, 163 Ct.Cl. 339 (1963); *see* Restatement of Contracts § 315.

5. Some cases state there must be a clause "expressly" exempting defendant from liability. *See, e. g., L. L. Hall Constr. Co. v. United States*, 379 F.2d 559, 177 Ct.Cl. 870 (1966). Under this statement, an extension of time clause could be considered insufficient under any circumstances to "expressly" negate liability for damages. However, a reading of several cases (see cases cited note 4, *supra*) indicates *Kehm* correctly states the rule. Moreover, *Hall* cites *Kehm* with approval.

6. F.R.Civ.P. 52(a).

7. *See Chalender v. United States*, 119 F.Supp. 186, 127 Ct.Cl. 557 (1954); cases cited note 4, *supra*; 4 Corbin on Contracts § 947 (1951).

8. Termination clauses are valid. *Goltra v. Weeks*, 271 U.S. 536, 46 S.Ct. 613, 70 L.Ed. 1074 (1926); 3A Corbin on Contracts § 721 (1960).

9. There was evidence that Burgess held several meetings with Morrin prior to the take-over and had expressed its concern with Morrin's poor performance. As early as October 7,

with the terms of the subcontract's termination clause and was not guilty of a breach.

[14] The trial court enumerated 31 findings of fact. Morrin contends 19 of them were clearly erroneous. Were we to look only at Morrin's evidence, we might be able to agree with its contentions, but we must look at the whole record.[10] As the facts stated in this opinion disclose, the evidence was conflicting in varying degrees on every major point of contention. In such cases the "clearly erroneous" rule creates a difficult burden for an appellant. To discuss each finding of fact individually would require too many pages of this opinion. Therefore, we will group them according to the issues.

We have already stated our opinion that the evidence was sufficient to support the trial court's finding that Burgess breached neither an express nor an implied promise to provide work sites on certain dates. We likewise have found the evidence sufficient on issues relating to the termination and take-over of Morrin's work. However, Morrin makes an additional argument on this point. The trial court found the last work on which Morrin's time of performance was conditioned was completed on December 27, 1971. Morrin argues this is clearly erroneous because one witness, Morrin's president, testified that work not mentioned in the subcontract, consisting of bypass piping and electrical conduit, was not complete until February 21, 1972, and that four concrete pours in the gate chamber could not be made until this was done. According to Morrin, the trial court should have found the subcontract allowed Morrin two months from February 21, rather than December 27, to complete its work. We do not believe the trial court's finding is erroneous. Other witnesses testified the gate chamber was available for pouring concrete in accordance with the terms of the subcontract on December 27, 1971. Moreover, the evidence indicates it was clear at the time of termination that Morrin would be unable to complete on time. Nowhere does Morrin argue that it could.

[15] Of the other findings Morrin contests, many concern whether Morrin's inability to perform on time was caused by its inefficiency or by extra work and schedule changes forced on it by Burgess. There was substantial evidence that the extra work was insignificant and the schedule changes should not have prevented Morrin from completing on time. In any event, error in these findings could not be a basis for reversal. The schedule of operations was for the convenience of Burgess and Morrin and other subcontractors in coordinating the work. Burgess did not guarantee that Morrin would be allowed to work in the sequence its schedule proposed. On the contrary, Burgess retained the right to direct the order of Morrin's performance in the manner necessary to the completion of the project as a whole.

[16, 17] Finally, Morrin contends certain items of damages in the judgment are not supported by the evidence. Morrin contends it was erroneous to include an amount for overhead in Burgess' damages for the cost of completing Morrin's work. The amount was calculated by allocating a percentage of Burgess' total overhead to the work completed on the Morrin subcontract. Morrin argues there is no proof the extra work actually increased Burgess' overhead or, if it did, in what amount. Under the circumstances, however, this was the best measure available. Overhead is a proper element of cost of completion damages, and an allocation is a proper measure of the amount. *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. 1967); *Grand Trunk Western R. Co. v. H. W. Nelson Co., Inc.*, 116 F.2d 823 (6th Cir. 1941). We have examined the record and conclude there was no error in the other items of damage contested on appeal by Morrin.

Although Morrin may have suffered substantial losses on this transaction, under the terms of the subcontract Burgess committed no breach and Morrin is not entitled to damages. The evidence did establish a breach by Morrin. We find no error in the judgment of the district court.

Affirmed.

1971, Burgess informed Morrin that unless its performance improved, Burgess might take over the work. To this Dean Morrin responded, "Be my guest." Burgess made repeated requests for an updated completion schedule, but received no estimate until after the termination letter. An expert witness testified Morrin should have been able to complete performance within the time allowed in the contract with extensions for delay in site access. In addition, a Bureau of Reclamation inspector testified Morrin's work was substandard and inefficient. He attributed the causes of delay to Morrin.

10. *Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974).

United States Court of Appeals
for the Fifth Circuit

No. 75-1794

D. C. Docket No. CA-6340-70-T

E. C. ERNST, INC.,
Plaintiff-Appellant Appellee,

versus

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, PROVIDENCE HOSPITAL, FAIRBANKS-MORSE, INC., CHARLES H. McCAULEY ASSOCIATES, INC.,
Defendants-Appellees Appellants.

Appeals from the United States District Court for the Southern District of Alabama

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Before GODBOLD, McCREE* and TJOFLAT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

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* Judge McCree, of the Sixth Circuit, participated in the oral argument of this case, but did not participate in this decision.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and vacated in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that the costs on appeal be divided equally among all five parties.

May 9, 1977

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-854

PROVIDENCE HOSPITAL,

Petitioner,

vs.

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS-MORSE, INC.,

Respondents.

BRIEF OF RESPONDENT MANHATTAN CONSTRUCTION COMPANY OF TEXAS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

David M. Thornton
THORNTON, WAGNER & THORNTON,
a Professional Corporation
1111 Mid-Continent Building
Tulsa, Oklahoma 74103

Counsel for Respondent
Manhattan Construction
Company of Texas

January 24, 1978

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS-MORSE, INC.,

Respondents.

BRIEF OF RESPONDENT MANHATTAN CONSTRUCTION COMPANY OF TEXAS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, Manhattan Construction Company of Texas ("Manhattan") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari filed by Providence Hospital ("Providence").

QUESTION PRESENTED

Should a writ of certiorari issue to review a decision of the Court of Appeals which does not violate the standards of Supreme Court Rule 19?

STATEMENT OF THE CASE

This case arose from a series of disputes between the parties during the construction and renovation of a hospital in Mobile, Alabama. The parties are Ernst, an electrical subcontractor; Manhattan, the general contractor; Providence Hospital, the owner; McCauley, the architect; and Fairbanks-Morse, Ernst's electrical supplier.

The action was commenced by Ernst on October 28, 1970. After more than four years of proceedings and a forty-day bench trial, the District Court for the Southern District of Alabama entered its lengthy opinion, 387 F.Supp. 1001 (S.D. Ala. 1974).

On December 16, 1970, in response to Ernst's Complaint and Manhattan's Answer and Cross-Claim, Providence filed a "Motion to Dismiss" and alternatively "to Stay the Action." The requested "stay" was not for purposes of resorting to arbitration but to require Manhattan to finish construction first. Attached to the motion was a copy of the twenty page general conditions of the contract, paragraph 6 and 7 of which concerned arbitration. Providence filed a supplemental brief

which referred to arbitration but only as a ground for dismissing Manhattan's suit. For the next two and one-half years Providence litigated – it engaged in discovery, presented cross-claims (trying to appeal to the Circuit Court of Appeals for the Fifth Circuit from dismissal of some of them), and filed various motions. It at no time sought to start arbitration. In fact, Providence at one time stated that if Manhattan should persist in its efforts to arbitrate, Providence would prevent same by filing a lawsuit.

The trial court held that the failure to invoke the provisions of permissive arbitration is the equivalent of a waiver of such provisions and found that the inactions of Providence in this regard was testament to such waiver.

The Court of Appeals affirmed, [551 F.2d 1026 (5th Cir. 1977) rehg. 559 F.2d 268 (5th Cir. 1977).]

ARGUMENT

Providence in its Petition for a Writ of Certiorari presents three questions for this Court to decide:

> 1. Does a defendant forfeit benefits of a contractual dispute settlement procedure requiring arbitration as a prior condition to suit by moving to dismiss a contract claim, never presented to arbitration, for failure to state a claim upon which relief can be granted?

2. Are courts bound by contractual provisions specifying time limitations on filing and appealing claims and restricting remedies where a party to the contract waives the forum of arbitration?

3. Is the construction by a district court of a purported "no damage" clause in a construction contract entitled to deference unless clearly erroneous under Rule 52(a) F.R.Civ.P.?

However, questions 1. and 2., when stripped of their legalese and excess verbiage are really one. (The third question presented by Providence should be ignored since it is not based upon any finding of the trial court upon which an implied finding could be based. Burgess Const. Co. v. Morrin & Son Co., Inc., 526 F.2d 108 (10th Cir. 1975) does not support Providence's contention.)

Contrary to what Providence would have this Court believe by the wording in its first two questions, the Court of Appeals did not rule that Providence forfeited its right to arbitration by filing a motion to dismiss a contract for failure to state a claim upon which relief can be granted. Rather, the Fifth Circuit held that Providence waived arbitration in view of its pattern of pre- and post-suit behavior. Specifically, as to Providence's post-suit behavior, the Court noted that after the complaint was filed, Providence filed a "Motion to Dismiss" Manhattan's claims and alternatively, to "stay the action" (not for purposes of resorting to arbitration). It wasn't until

two and one-half (2-1/2) years later, and after Providence had actively litigated the lawsuit through discovery, cross-claims and various motions, that it sought arbitration.

It is clear that Providence did not merely file a motion to dismiss, but actively participated in and beyond the initial or preliminary proceedings and Manhattan submits that the Fifth Circuit's decision that this involvement constituted a waiver of the right to arbitration is in accord with the Federal Arbitration Act, 9 U.S.C.A. §3, and decisions of other Courts of Appeals.

Section 3 of the Federal Arbitration Act, supra, states:

"3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." (Emphasis added)

In the following cases, Courts of Appeals have held, pursuant to the aforementioned section of the Federal Arbitration Act, that a party is in default and waives his right to arbitration when he actively participates in the litigation beyond initial or preliminary proceedings.

In Radiator Specialty Co. v. Cannon Mills, Inc., 97 F.2d 318, 117 ALR 299 (4th Cir. 1938), the defendant, a purchaser under a contract for the sale of goods, rather than immediately asserting his right to arbitration upon the filing of plaintiff's complaint, appeared and filed an answer, set up a counterclaim, delayed for three (3) months before filing and being granted a motion for continuance, and allowed another six (6) months to expire before, on the day expressly agreed for the trial, asserting the right to arbitration. The Fourth Circuit held that the defendant waived his right to arbitration and was "in default" in proceeding with arbitration within the meaning of the Federal Arbitration Act, saying:

> "[I]t is clearly the intention of Congress to provide that the party seeking to enforce arbitration can do so only when not guilty of dilatoriness or delay. One having the right to arbitrate and to stay an action at law, pending arbitration under this statute, may waive such right.
>
> . . . .
>
> "By setting up a counterclaim for damages the defendant not only submitted to the jurisdiction of the court where the cause was pending, but expressly invoked that jurisdiction."

In Cornell & Co. v. Barber & Ross Co., 242 F.Supp. 825, aff. 123 App. D.C. 378, 360 F.2d 512 (Dist. of Col. Cir. 1966), before the defendant filed a motion for a stay to permit arbitration, he had moved for a transfer of venue, filed an answer and a counterclaim, and filed notice of depositions, took a deposition and procured the production of various records and documents. The District of Columbia Circuit noted that the litigation machinery had been "substantially invoked and the parties were well into the preparation of a lawsuit by the time . . . an intention to arbitrate was communicated by the defendant to the plaintiff," and that the defendant was in default with arbitration within the meaning of the Federal Arbitration Act. The Court said:

> "The right to arbitration, like any other contract right, can be waived. A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right. Once having waived the right to arbitrate, that party is necessarily 'in default in proceeding with such arbitration.' "

And in American Locomotive Co. v. Chemical Research Corp., 171 F.2d 115 (6th Cir. 1948) cert. den. 336 U.S. 909, a delay of more than seven (7) years in moving, under the Federal Arbitration Act, for a stay of an action on a contract, was held to constitute a default, even though the defendant, in its answer to plaintiff's Complaint, had alleged a special defense based on the arbitration provisions of the contract.

During the next seven (7) years, defendant made no attempt to proceed to arbitration but instead filed numerous pleadings including a counterclaim, motions, agreed orders and expensive discovery proceedings. The Sixth Circuit stated that "the delay . . . in moving for a stay was unreasonable and unexcusable under all the circumstances and constituted 'default' on its part in proceeding with arbitration."

For additional pertinent cases, see Blake Constr. Co. v. U.S., 252 F.2d 658 (5th Cir. 1958); American Locomotive Co. v. Gyro Process Co., 185 F.2d 316 (6th Cir. 1950); and La Nacional Platanera, S.C.L. v. No. American Fruit & S.S. Corp., 84 F.2d 881 (5th Cir. 1936).

Providence, in its brief, only cites one case that it believes to be in conflict with the present decision of the Fifth Circuit, Germany v. River Terminal Railway Co., 477 F.2d 546 (6th Cir. 1973). In Germany, a defendant specifically cited the arbitration provision of the agreement in a tendered amendment to a pleading in support of its position that a cross-claim failed to state a claim upon which relief could be granted. The Sixth Circuit held that under these circumstances, there was no waiver of the right to arbitration saying,

> "An agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon. Burton-Dixie Corp. v. Timothy McCarthy Const. Co., 436 F.2d 405 (5th Cir. 1971). However, waiver may not be inferred

> from the fact that a party does not rely exclusively on the arbitration provisions of a contract . . . . "

The decision in Germany is not in conflict with the decision of the Fifth Circuit for the facts of the two cases are dissimilar. In Germany, the arbitration provision of the agreement was specifically cited in a pleading, whereas in the present case Providence did not base its Motion to Dismiss or, in the Alternative, to Stay the Action on the ground that it desired to resort to arbitration. And in Germany the defendant relied on the arbitration provisions of the contract early in the lawsuit, whereas in the present cause Providence never tried to invoke arbitration until the case had been substantially litigated.

Providence cites Shanferoke C. & S. Corp. v. Westchester S. Corp., 293 U.S. 449 (1935) and General Guar. Ins. Co. v. New Orleans General Agency, Inc., 427 F.2d 924 (5th Cir. 1970) in support of its Petition, but the facts in both cases differ from those in the present case. In Shanferoke, the defendant set up in its answer, as a special defense, the arbitration provision of the contract. The defendant also moved that the action be stayed until arbitration could be had in accordance with the terms of the contract sued on. And in General, the defendant filed in the alternative to a motion for summary judgment, dismissal of the complaint for failure to state a claim, a motion to stay pending arbitration in accordance with the Federal Arbitration Act. In the present case Providence did not set up arbitration as a special defense in an answer nor did it file a motion to stay the action for purposes of resorting to arbitration.

Another contention of Providence is that arbitration was a condition precedent to suit. The law is clear that either party to a contract of arbitration may waive it. The provision may be waived by a plaintiff by initially bringing suit for damages without relying upon the provision or by a defendant not moving for a stay of the proceedings to resort to arbitration but instead actively litigating the issues in the lawsuit. La Nacional Platanera, S.C.L. v. North American Fruit & S.S. Corp., supra.

Providence's established post-suit actions in all phases of a complex litigation served as a waiver of its right to arbitration.

CONCLUSION

For all of the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

David M. Thornton
THORNTON, WAGNER & THORNTON,
a Professional Corporation
1111 Mid-Continent Building
Tulsa, Oklahoma 74103

CERTIFICATE OF SERVICE

I, David M. Thornton, hereby certify that true and correct copies of the foregoing Brief of Respondent Manhattan Construction Company of Texas In Opposition To The Petition For A Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit were served upon the following parties by placing said copies in the United States Mail, postage prepaid on the 24th day of January, 1978:

Attorney for Providence Hospital

Willis C. Darby, Jr., Esquire
P. O. Box 2565
Mobile, Alabama 36601

Attorney for E. C. Ernst, Inc.

Glower Whitehead Jones
Smith, Currie & Hancock
2600 Harris Tower – Peachtree Center
Atlanta, Georgia 30303

Attorney for Charles H. McCauley Associates, Inc.

Maurice Bishop, Esquire
Bishop & Carlton
327 Frank Nelson Building
Birmingham, Alabama 35203

Clarence V. McDorman, Esquire
London, Yancey, Clark & Allen
2100 First National Southern Natural Building
Birmingham, Alabama 35203

Attorney for Fairbanks-Morse, Inc.

Louis E. Braswell, Esquire
P. O. Box 123
Mobile, Alabama 36601

David M. Thornton
THORNTON, WAGNER & THORNTON
a Professional Corporation
1111 Mid-Continent Building
Tulsa, Oklahoma 74103

Supreme Court, U.S.
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JAN 11 1978
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-854

PROVIDENCE HOSPITAL,
Petitioner,

versus

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS MORSE, INC.,
Respondents.

BRIEF OF FAIRBANKS MORSE, INC., OPPOSING PETITION FOR CERTIORARI

LOUIS E. BRASWELL
P.O. Box 123
Mobile, Ala. 36601
Counsel for Respondent
Fairbanks Morse, Inc.

January 11, 1978

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-854

PROVIDENCE HOSPITAL,
Petitioner,

versus

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS-MORSE, INC.,
Respondents.

BRIEF OF FAIRBANKS MORSE, INC., OPPOSING PETITION FOR CERTIORARI

The issues raised in the petition for certiorari do not directly concern Fairbanks Morse, Inc. (Fairbanks). However, Fairbanks opposes the petition because the issues are manifestly not worthy of certiorari and because the interests of justice require that the case move forward promptly in the district court on remand.

The briefs of other parties will discuss why the case is not worthy of certiorari. Language from the

decisions of the court of appeals makes argument almost unnecessary.

The interests of justice will best be served if the remaining issues, as designated by the court of appeals, are dealt with by the district court on remand. This case involves five parties and many issues — many more than those raised in the petition for certiorari. The district court has indicated that the remaining issues should be considered as soon as it would be appropriate and judicious to do so. A schedule for briefing and hearing has already been established. Fairbanks shares the district court's desire to see this complex case brought to a conclusion as soon as possible. Since the issues raised in the petition for certiorari would bear upon a claim to be considered by the district court on remand, granting certiorari would further slow the progress of this case.

For these reasons the petition for certiorari should be denied.

Respectfully submitted,

Louis E. Braswell
Counsel for Respondent
Fairbanks Morse, Inc.
P.O. Box 123
Mobile, Ala. 36601

PROOF OF SERVICE

I, Louis E. Braswell, the attorney for Fairbanks Morse, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of January, 1978, I served copies of the foregoing Brief on the several parties by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

Attorneys for E. C. Ernst, Inc.

Glower W. Jones, Esquire
Smith, Currie & Hancock
2600 Peachtree Center, Harris Tower
233 Peachtree Street, N. E.
Atlanta, Georgia 30303

Arthur S. Friedman, Esquire
Friedman & Gass
99 Park Avenue
New York, New York 10016

Attorney for Manhattan Construction Company of Texas

David M. Thornton, Esquire
1111 Mid-Continent Building
Tulsa, Oklahoma 74103

Attorneys for Charles H. McCauley Associates, Inc.

Maurice Bishop, Esquire
Bishop & Carlton
327 Frank Nelson Building
Birmingham, Alabama 35203

Clarence V. McDorman, Esquire
London, Yancey, Clark & Allen
2100 First National Southern
Natural Gas Building
Birmingham, Alabama 35203

Attorney for Providence Hospital

Willis C. Darby, Jr.
P.O. Box 2565
Mobile, Alabama 36601

Louis E. Braswell
Attorney for Respondent
Fairbanks Morse, Inc.
P.O. Box 123
Mobile, Alabama 36601

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MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS-MORSE, INC.

Respondents.

BRIEF OF RESPONDENT E. C. ERNST, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Glower Whitehead Jones
SMITH, CURRIE & HANCOCK
2600 Harris Tower – Peachtree Center
Atlanta, Georgia 30303
and
Arthur S. Friedman
FRIEDMAN & GASS
99 Park Avenue
New York, New York 10016
Counsel for Respondent E. C. Ernst, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-854

PROVIDENCE HOSPITAL,

Petitioner,

versus

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS-MORSE, INC.

Respondents.

BRIEF OF RESPONDENT E. C. ERNST, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, E.C. ERNST, INC. ("Ernst"), respectfully submits this Brief in opposition to the Petition for a writ of certiorari filed by Providence Hospital ("Providence").

QUESTION PRESENTED

Should a writ of certiorari issue to review a decision of the Court of Appeals where the questions sought to be reviewed are not important or substantial, are questions of fact, and neither conflict with decisions of other courts of appeal nor depart from the accepted and usual course of judicial proceedings?

STATEMENT OF THE CASE

Providence's "Statement of the Case" omits or distorts a variety of significant facts which relate to its Petition*:

1. Providence suggests (Petition, p. 6-9) that it timely asserted its right to arbitration, and intended to proceed to arbitration. The suggestion is unsupported by any fact and has been, indeed, explicitly rejected.

The uncontradicted fact is that Providence never intended that any dispute go to arbitration here. In the more than seven years that this case has been pending, Providence never demanded arbitration nor took any step to initiate arbitration.

It was Providence's idea that if it could invoke the talisman of "arbitration", defensively, as ground to have the lawsuit dismissed, Providence would *then* be free to say that there was no case for arbitration – because it had allegedly been waived by the other parties involved in the lawsuit. So far as Providence was and is concerned, it did not want to go, and was not, and is not going to any arbitration. In short, "arbitration" to Providence was a bald device – a device which the District Court and Court of Appeals saw through as nothing more than an attempt to immunize Providence *from any determination* of the disputes which existed among the parties to this action. Indeed, counsel for Providence had boldly proclaimed prior to the filing of this action (while the construction was still under way) that if Ernst or any other party attempted to go to arbitration to resolve disputes which were pending, and which became central issues in this suit, Providence would immediately institute an action in the District Court to enjoin any such arbitration, (Tr. 2850-3, Ernst Trial Exhibit 268).

2. Providence refers to a Brief filed on December 17, 1970 as if that is some support for the proposition that Providence invoked arbitration as a ground of motion for stay at that time.

* To the extent that the Providence Petition incorrectly summarizes additional facts (e.g., Ernst's Complaint and related proceedings) such "facts" are not material to the Petition and will not be responded to herein.

The motion itself advanced no such ground, and the mere attachment thereto of the voluminous General Conditions does not support any such assertion. The fact is, and was, that Providence's motion and supporting Brief did not seek a stay on the grounds of arbitration. Indeed, the basis of the motion was explicitly inconsistent with arbitration. The motion was for stay "***because this cause will not be ready for *judicial* determination until such time as Manhattan has performed its obligations under the construction contract with Providence." (Emphasis supplied)

ARGUMENT

This Court would be hard pressed to find a more unlikely candidate for certiorari. The "questions" presented by Providence simply do not merit issuance of the writ.

The standards for granting a writ of certiorari are reasonably defined in Supreme Court Rule 19. The questions presented by Providence satisfy none of those standards.

To be sure, Providence tries to squeeze its "questions" into recognized categories by inventing conflicts between the Circuits and "important" questions of law. But the categories simply do not fit the issues.*

The only "reason" advanced by Providence in support of its Petition which concerns Ernst** is the supported "hostility" of

* At root, Providence is unable to show that the issues raised by it are important to the public, and not just to the parties involved. That failure virtually precludes the granting of certiorari. See, e.g., Rice v. Sioux City Cemetery, 349 U.S. 70 (1955); Layne & Bowler Corp. v. Western Wellworks, 261 U.S. 387 (1922).

** To be sure, Providence's other "reason" – the alleged improper standard utilized by the Fifth Circuit in reviewing the District Court's construction of a purported "no-damage" clause – is likewise without merit. Providence rests its argument on an "implied" finding made by the District Court (Petition, p. 14). Despite that *ipse dixit*, the District Court did *not* make any such "implicit" finding, i.e., a finding which is necessarily encompassed within an express finding. Weber v. McKee, 215 F. 2d 447 (5th Cir. 1954). *A fortiori*, the Court of Appeals decision was not in conflict with Burgess Const. Co. v. M. Morrin & Son Co., Inc., 526 F. 2d 108 (10th Cir. 1975).

the Fifth Circuit * to arbitration and the supposed "conflict" between the Court of Appeals decision and the decision of the Sixth Circuit in *Germany v. River Terminal Railway Co.*, 477 F. 2d 546 (6th Cir. 1973). The argument is preposterous. The fact is, as the Court of Appeals found, that *despite* the federal policy favoring arbitration** *Providence waived arbitration.* 551 F. 2d at 1040, 1041. That determination of what is, at base, a question of fact, *(Burton-Dixie Corp. v. Timothy McCarthy Const. Co.*, 436 F. 2d 405 [5th Cir. 1971]) is not a proper subject for this Court's discretionary review.

> "The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved, or upon a construction of particular contracts or written instruments." Stern & Gressman, *Supreme Court Practice*, § 4.3 (4th Ed. 1969).

The Court of Appeals properly rested its finding of waiver on Providence's pre- and post-litigation conduct. And that finding was more than amply supported by the facts and the law.

The law is clear that a party desiring to invoke arbitration as a means of resolving a dispute (instead of permanently avoiding determination of that dispute) must take affirmative action – or the right to arbitrate will be no longer available:

> "... the offensive in instituting proceedings for arbitration *lies with the aggrieved party:* and *the other's denial of any contractual obligation to arbitrate does not relieve the aggrieved party from the necessity of taking steps to initiate an arbitration before seeking an order under the arbitration act ...* " 6 C.J.S. Arbitration § 36, p. 223 (Emphasis supplied).

and

> "The right to enforce arbitration may be waived by failure to assert, or delay in asserting the right." 6 C.J.S. Arbitration § 37, p. 227.

Those general principles – and the action required to preserve the right to arbitration – are confirmed by Sections 3 and 4 of the Federal Arbitration Act (9 USCA § 3) which provides in part:

> "3. Stay of proceedings where issue therein referable to arbitration.
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action *until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.*" (Emphasis supplied)
>
> "4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.
>
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration *may petition* any United States district court which, save for such agree-

* Presumably, this "hostility" is limited – according to Providence – to this case, for Providence cites another Fifth Circuit case, General Guar. Ins. Co. v. New Orleans General Agency, Inc., 427 F. 2d 924 (5th Cir. 1970), which the Court of Appeals *specifically distinguished* in the instant case. 551 F. 2d at 1040, n. 39.

** Providence's citation of Alabama state law is entirely inapposite. The Court of Appeals correctly applied federal law, i.e., the United States Arbitration Act, 9 U.S.C. § § 1, *et seq.*, 551 F. 2d at 1040 citing Prima Paint Corp. v. Flood & Conklin Mfg. Co. 388 U.S. 395 (1967) and Stokes v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 523 F. 2d 433 (6th Cir. 1975).

ment, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, *for an order directing that such arbitration proceed in the manner provided for in such agreement.*" (Emphasis supplied)

The requirement to take affirmative action is clear. The remedies available are codified – a *stay of proceedings* for a pending court action and a *petition to compel arbitration.* Providence did neither.

> "It is the policy of the court to enforce arbitration agreements without legal technicality, *but it is generally incumbent on one who wishes to arbitrate to follow the procedure provided for by the agreement to arbitrate or by controlling mandatory statute.*" C.J.S. Arbitration §39, p. 231. (Emphasis supplied)

A party which desires to interpose arbitration as a judicial plea in bar is obliged to do so either by motion addressed to the Complaint or in its Answer. A failure to raise that bar in either of those two ways constitutes a waiver. It is clear that Providence never raised arbitration in support of its motion to dismiss Ernst's original complaint nor in any responsive pleading which it filed thereto.

The first time Providence raised the cry of arbitration was in the Fall of 1972, some two years after the case had begun – and then only after (a) a five-day trial in early 1971 of the issue of the compliance of the Fairbanks generator with the specifications, (b) numerous amendments in pleadings, and (c) partial discovery. That course of conduct by itself would preclude Providence from seeking arbitration even if it had sought arbitration at that time.

There is more. One who seeks to invoke arbitration as a bar to Court action cannot do so if he has voluntarily submitted to the Court *his own claims* against the other parties.* *This is*

* Radiator Specialty Co. v. Cannon Mills, Et Al, 97 F. 2d 318, 117 ALR 299 (4th Cir., 1938).

precisely what Providence did by asserting a counterclaim * against Ernst for damages in January, 1972. That counterclaim was dismissed. It was only after that dismissal that Providence decided to resort to its arbitration gambit. It was far too late. Having judicially asserted such a claim, Providence was thereafter barred from invoking arbitration.

Another fact bars Providence. Even though Ernst's original complaint was dismissed as against Providence at the trial (in 1971) on the issue of compliance of the proposed Fairbanks-Morse emergency generator equipment, Providence participated in the trial in every respect in which an interested party defendent would. Its participation contributed to the ultimate result of the Court's holding that the emergency generator equipment proposed by Fairbanks-Morse did not qualify under the specifications. The result, of course, was very much to Providence's liking. Having gotten such a judicial determination, Providence thereafter concluded that it had enough of litigation. As a matter of law, Providence's participation in the hearing aforesaid barred it from thereafter invoking arbitration in respect of disputes among the same parties on the same Project, and under the same contract.

> ". . . the defendent's conduct in filing an answer or counterclaim, or tendering issue on the merits, *without demanding arbitration* is an action instituted on the contract by the other party in disregard of the arbitration provision, is clearly inconsistent with the notion that he considers the arbitration provision as still in effect, or anticipates availing himself of his rights thereunder, and consequently, generally constitutes a waiver thereof." 161 ALR 1429 [citing cases] [Emphasis supplied]

* Interestingly, this counterclaim was asserted against Ernst at a time when the District Court had already dismissed Ernst's original complaint as against Providence in December 1970.

It is disingenous for Providence to suggest that its arbitration argument turns on whether it needed to make a demand for arbitration before it moved to dismiss the suit.* That never was, and still is not, the issue. Since Providence *never* invoked arbitration, and never intended to, the distinction between pre and post suit demand, is an irrelevant gratuity.

> ". . . where defendent neither demands arbitration, nor takes steps to secure arbitrators, the provisions in the contract for arbitration constitute no defense to the action." Anno., Waiver of Arbitration Clause, 117 ALR 308 at 313.

> "An arbitration agreement in a contract is not a defense to an action on the contract, but it may be set up by the defendent in such action for the purpose of indicating that he has not waived his right to arbitration; and the remedy of a defendant which is sued in New York on a contract containing an arbitration provision is to proceed under §§ 3 and 5 of the Arbitration Law of New York, by motion to direct that the arbitration proceed and that the action be stayed." [citing cases] 117 ALR 308 at 315

Good faith and diligence are prerequisites of the right to insist on arbitration.

> "Parties to an arbitration agreement are under a duty to act in good faith. Each owes to the other a duty to make a fair effort to carry out its provisions and to accomplish the real object of the agreement. If the arbitration fails through default of one of the parties, or the fault of his arbitrator, that party has abrogated the contract, and the other party, provided he is free from fault in the matter, may elect not to comply with the arbitration provision, and may bring suit on the contract without an award being made. A refusal of one party to arbitrate in accordance with the terms of the contract, his neglect or failure within a reasonable time to perform the agreement, or to demand arbitration if under a duty to do so, will each be relinquishment of his right to insist upon arbitration, either to enable him to bring suit himself or as a bar to a suit by the opposite party." [5 Am. Jur. 2d Arbitration and Award, § 53, p. 559]

Those prerequisites were undone by Providence's conduct.

Germany v. River Terminal Railway Co., supra (Petition, p. 13) presents no conflict between the Circuits. All that *Germany* holds is that "waiver may not be inferred from the fact that a party does not rely *exclusively* on the arbitration provisions of a contract.*" 447 F. 2d at § 47. (Emphasis supplied) Here, as the Court of Appeals found, Providence did not rely on the arbitration *at all* until it was too late; in *Germany*, in contrast, the arbitration provisions of the contract "were specifically cited"**: *Id.* In any event, the Court of Appeals here did *not* rely solely on Providence's participation in the litigation***. To the contrary, the Court held that in view of Providence's "pattern of pre- and post-suit behavior" it waived arbitration. 551 F. 2d at 1041. The decision was and is correct, and is not in conflict with *Germany*.

In summary, this case is not a proper case for the issuance of a writ of certiorari. It has long been settled that certiorari is *not* a vehicle whereby the defeated party in the Court of Appeals is simply given another hearing. *Magnum Co. v. Coty*, 262 U.S. 159 (1923). Yet Providence's Petition is unable to demonstrate anything more.

* It is apparent that the authority relied on by Providence in its Petition is of no effect here. General Guaranty Insurance Company v. New Orleans General Agency, Inc., 427 F. 2d 924, 928 (5th Cir. 1970) holds only that a pre-suit demand for arbitration is not a prerequisite for invoking the Federal Arbitration Act. It says nothing of the duty of the aggrieved party *after* suit has been filed. It is clear from the Act that the two remedies offered are designed to enforce a party's right to arbitration – not to thwart a resolution of the matter by merely mentioning the existence of an arbitration clause.

* The law is clear that the claimed "conflict" must be substantial; "there must be a real conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Stern & Gressman, *supra*, § 4.3

** And not, as here, buried within the 20-page "general conditions" 551 F. 2d at 1040.

*** Indeed, here the participation was far more extensive than the "meet[ing] [of] all issues raised" which occurred in *Germany* (477 F. 2d at 547). Here, Providence "engaged in discovery, presented cross-claims*** and filed various motions." 551 F. 2d at 1040.

CONCLUSION

For all of the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

Glower Whitehead Jones
SMITH, CURRIE & HANCOCK
and

Arthur S. Friedman
FRIEDMAN & GASS, P.C.

Attorneys for Respondent
E. C. Ernst, Inc.

Of Counsel:

SMITH, CURRIE & HANCOCK
2600 Peachtree Center – Harris Tower
Atlanta, Georgia 30303

FRIEDMAN & GASS, P.C.
99 Park Avenue
New York, New York 10016

PROOF OF SERVICE

I, Glower Whitehead Jones, Attorney for E.C. Ernst, Inc., respondent herein, hereby certify that I have served copies of the foregoing Brief in opposition to the Petition for a Writ of Certiorari on the several parties hereto by mailing copies in duly addressed envelopes with first class postage prepaid to their respective attorneys of record as follows on this 12th day of January, 1978:

Attorney for Providence Hospital:

Willis C. Darby, Jr., Esquire
P.O. Box 2565
Mobile, Alabama 36601

Attorney for Manhattan Construction Company of Texas:

David M. Thornton, Esquire
1111 Mid-Continent Building
Tulsa, Oklahoma 74103

Attorneys for Charles H. McCauley Associates, Inc.

Maurice Bishop, Esquire
BISHOP & CARLTON
327 Frank Nelson Building
Birmingham, Alabama 35203

Clarence V. McDorman, Esquire
LONDON, YANCEY, CLARK & ALLEN
2100 First National Southern
Natural Gas Building
Birmingham, Alabama 25203

Attorney for Fairbanks-Morse, Inc.

Louis E. Braswell, Esquire
Post Office Box 123
Mobile, Alabama 36601

Glower Whitehead Jones
SMITH, CURRIE & HANCOCK
2600 Harris Tower – Peachtree Center
Atlanta, Georgia 30303

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OCTOBER TERM, 1977

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PROVIDENCE HOSPITAL,
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MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS-MORSE, INC.,
Respondents.

REPLY BRIEF OF PROVIDENCE HOSPITAL TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIS C. DARBY, JR.
Post Office Box 2565
Mobile, Alabama 36601
Counsel for Petitioner

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504/822-1611

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IN THE
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REPLY BRIEF OF PROVIDENCE HOSPITAL TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

This case is important because the Fifth Circuit mishandled several questions pertinent to thousands of private contracts, including many contracts for hospital construction which contain identical General Conditions developed by the U. S. Public Health Service. These errors apparently stem from a judicial distrust of contractual arbitration and limitation of remedies, and a reluctance to accept the policy of the Federal Arbitration Act of 1925, 9 U.S.C. §§ 1 *et seq.*

First, the Fifth Circuit ignored state law pertinent to the enforcement of contractual dispute settlement provisions, holding that the arbitration issues were controlled solely by federal law. Alabama substantive law, which favors enforcement of contractual arbitration, as well as that of many other states, is not inconsistent with the Federal Arbitration Act, and the Fifth Circuit erred in holding such state law to be preempted.

Second, the Fifth Circuit, as well as the District Court, gave no deference to the unappealed decision of the architect as the first step of a two-step arbitration process. Thousands of contracts contain two-step arbitration procedures, and the refusal (without discussion) to defer to the unappealed first-step decision with respect to the claims in this case jeopardizes innumerable similar first-step decisions in other contracts.

Third, the Fifth Circuit, as well as the District Court, ignored contractual language that second-step arbitration was a condition precedent to suit. Such language also is common and enforceable under federal law as well as the law of Alabama and several other states, and should have been enforced in this case.

Fourth, the Fifth Circuit and the District Court treated default in proceeding to arbitration with respect to one issue as waiver of all arbitration with respect to every other issue, arising before or after the default.

Fifth, the Fifth Circuit reversed without discussion the District Court's denial of monetary damages,

although the contract contained a common "no damage" clause which could have been (and was) construed by the District Court to preclude monetary damages.

The General Conditions of the contract at issue provide for a detailed private dispute settlement procedure as well as exclusive remedies. Such provisions are common, and Alabama law, as well as federal law, enforces the provisions in question. The reluctance of the Fifth Circuit to enforce these provisions is inconsistent with the Federal Arbitration Act, and is a matter of substantial importance because similar provisions occur almost universally in construction contracts and commonly in other contracts.

I. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT THE FEDERAL ARBITRATION ACT PREEMPTED STATE LAW AND LIMITED CONTRACTUAL ARBITRATION RIGHTS.

In this diversity action, Providence's contractual arbitration rights depended in part upon the law of Alabama, and in part upon the Federal Arbitration Act. Under Alabama law, a contractual agreement that arbitration is a condition precedent to suit, is enforceable. *Sims v. City of Birmingham*, 254 Ala. 598, 610 (1950). Alabama likewise recognizes and enforces the requirement that administrative remedies (including contractual arbitration) must be exhausted, or an excuse for failure to exhaust such remedies established, before relief is available in the courts. See

Republic Steel Corp. v. Maddox, 275 Ala. 685 (1963), reversed on other grounds 379 U.S. 650.

Providence repeatedly and vigorously asserted substantive rights under Alabama law and the arbitration and contractual remedy provisions of the Providence - Manhattan contract, discussed at pp. 7-18 below, to have Manhattan's cross-claims dismissed, not merely stayed for belated arbitration.

The Fifth Circuit recognized the applicability of the Federal Arbitration Act, but treated the Federal Arbitration Act as preempting Alabama state law governing Providence's contractual rights (Decision, Petition App. 25a).[1] The Ernst Brief argues at page 6, and Manhattan implicitly concurs, that "Providence's citation of Alabama state law is entirely inapposite" because the Fifth Circuit correctly held that the Federal Arbitration Act preempted state law which would have precluded Manhattan's claims against Providence in this diversity action.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, and *Stokes v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433 (6th Cir. 1975), cited by the Fifth Circuit and the Ernst Brief, deal with the preemp-

1 The decision of the District Court is reproduced in the Appendix to the Petition for Certiorari, and is cited herein as "Finding ___" or "Conclusion ___, Petition App. ___". The initial decision of the Fifth Circuit is cited herein as "Decision, Petition App. ___"; the opinion of the Fifth Circuit on rehearing is cited herein "Opinion on Reh., Petition App. ___". The Record is cited "R. ___"; the Appendix on appeal is cited "A. ___". The pages of the Appendix to this response are numbered beginning after the last page of the Petition Appendix.

tion of state law inconsistent with the granting of a stay under 9 U.S.C. §3. Neither *Prima Paint* nor *Stokes* held that 9 U.S.C. §3 preempted state substantive law concerning enforcement of arbitration as a condition precedent to suit, or enforcement of a first-step arbitration decision, which are consistent with "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts," recognized in *Prima Paint*, 388 U.S. 395, 404.

The question in this case may be stated:

> Whether in a diversity action for breach of contract subject to the provisions of the Federal Arbitration Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action.

Alabama law that the failure to exhaust administrative remedies (such as contractual arbitration) would subject Manhattan's claims to dismissal, is consistent with the Federal Arbitration Act and its underlying policy; the Fifth Circuit erred in considering such Alabama law preempted. The continuing vitality of state law concerning arbitration in diversity cases was established in *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198.

In *Transcontinental & Western Air v. Koppal*, 345 U.S. 653, this Court granted certiorari for questions related to alleged preemption of state law governing

the right to bring an action. The first question in *Koppal* was:

> Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action. 345 U.S. 653, 656.

The holding of the Fifth Circuit that Providence's sole contractual arbitration right was to a stay, and that Providence's motions to dismiss (and defense after the motions were denied) waived that right, raises a preemption question similar to that which this Court faced in *Koppal*.

The legislative history of the Federal Arbitration Act makes it clear that the Act was intended to encourage enforcement of contractual arbitration agreements, not to preempt state law requiring exhaustion of contract remedies such as arbitration. H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) (App. 96a hereto) sets out the intent of the Federal Arbitration act to make contractual arbitration agreements enforceable, rather than to abrogate state law which fostered enforcement of contractual arbitration agreements:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement.

The Fifth Circuit's holding that Providence's exclusive right was the federal right to a stay is inconsistent with the intent of the Federal Arbitration Act, to make contractual provisions concerning arbitration enforceable. Dismissal of Manhattan's cross-claims against Providence, as required by Alabama law, would enforce the arbitration agreement of the parties by preventing litigation in violation of the contractual commitment to arbitration. The policy of the Federal Arbitration Act is consistent with the law of Alabama, and inconsistent with the preemption of Alabama law which is a necessary element of the Fifth Circuit's decision.

II. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT THE FEDERAL ARBITRATION ACT LIMITED CONTRACTUAL ARBITRATION RIGHTS TO A STAY OF PENDING LITIGATION FOR ARBITRATION.

A. The Fifth Circuit Held Providence's Sole Right Under The Contractual Arbitration Provisions To Be To Timely Move For A Stay Pending Arbitration.

The Federal Arbitration Act provides that a party such as Providence may move for a stay in favor of contractual arbitration. When this litigation commenced, Providence moved to dismiss or to stay the claims of Ernst (with whom Providence had no con-

tractual arbitration) and Manhattan (with whom Providence had contractual arbitration).[2]

The Fifth Circuit held that the initial motion of Providence to dismiss or to stay the action did not properly invoke the Federal Arbitration Act, because Providence's motion to stay was not specifically for arbitration. (Decision, Petition App. 26a).[3]

The analysis of the Fifth Circuit, which the Manhattan Brief and the Ernst Brief adopt and exaggerate,[4] is that the sole question concerning the arbitration provisions of the Providence - Manhattan contract is whether Providence waived the right to a stay by failure to demand arbitration. This analysis depends upon four misconceptions: first, that the Federal Arbitration Act preempted state law which gave Providence contractual rights not limited solely to a stay for arbitration; second, that Providence's only contractual arbitration right under federal law was a 9

2 As set out in the Providence petition for certiorari at pp. 5-6, the December 17, 1970, brief in support of that motion to dismiss or to stay raised the arbitration provisions of the contract between Manhattan and Providence (Petition App. 70a-72a).

3 Whether or not most appropriate, the motion to dismiss should have been procedurally sufficient, as set out at p. 15-18 below.

4 The Ernst Brief accuses Providence of untruthfully suggesting that "Providence ... intended to proceed to arbitration." Providence did not assert any intention to arbitrate belatedly; Providence sought, and seeks, to assert its contract rights *not* to be subjected to this litigation (or belated arbitration) over Manhattan's contract claims concerning the sewage ejection and Palco bedlight fixture problems which had been previously decided by the architect and which Manhattan had not timely appealed to arbitration. Providence did, however, move for a stay concerning the delay in releasing operating rooms, on which the architect's representative ruled adversely to Providence for the first time (A. 442-45) during trial (A. 400). The motion was summarily denied. (A. 401).

U.S.C. §3 stay; third, that Providence's litigation in defense of Manhattan's claims after Providence's motions to dismiss were denied, or Providence's litigation against parties other than Manhattan, with whom Providence had no arbitration agreement, waived Providence's rights with respect to claims by Manhattan; and fourth, that waiver of arbitration with respect to one matter waived arbitration with respect to all matters.

B. The Contractual Arbitration Provisions Established Rights Not Limited To A Stay Pending Arbitration.

The Providence - Manhattan contract provided that, in the event of delay allegedly caused by Providence as the owner, Manhattan could request an extension of the contract time under Paragraph 31(c) of the General Conditions (Petition App. 5a-6a). Manhattan requested such an extension of the contract time with respect to the claims which are the subject of the Petition for Certiorari, the sewage ejection problem and the Palco bedlight fixture problem. Under the General Conditions, the architect is to interpret the contract documents, and is to make findings with respect to requested extensions of time under Paragraph 31(c); the requests by Manhattan were denied concerning the sewage ejection problem (Finding 24, Petition App. 44a) and the Palco bedlight fixture problem (Finding 49, Petition App. 49a). Under Paragraph 31(c), the findings of the architect are "final and conclusive . . . subject only to arbitration, as specified herein"; and Paragraph 7 of the General Conditions provides that

the demand for arbitration shall be made "within thirty days after the dispute has arisen if practicable . . ." (Petition App. 3a). No such demand was made with respect to the sewage ejection problem[5] or the Palco bedlight fixture problem.[6] Arbitration is "a prior condition to any right of legal action . . ." by Providence or Manhattan under the Providence - Manhattan contract (General Conditions ¶ 7(a), Petition App. 2a).

At the time of the filing of this action, the thirty day period within which the architect's decision concerning the sewage ejection or Palco bedlight fixture problems could have been appealed to arbitration, had long since run; and no evidence was offered at any time that appeal within thirty days was not practicable. Provi-

5 No party ever raised any claim concerning the sewage ejection problem in any pleading prior to trial in 1973; Manhattan *first* raised its sewage ejection problem claim on the fourteenth day of trial (R. 2134-36, App. 90a-92a hereto). Providence objected to the line of questioning, raising the finality of the architect's decision and the lack of any timely appeal to arbitration of the sewage ejection problem (R. 2140, App. 92a hereto); the objection was overruled (R. 2141, App. 92a-93a hereto).

6 Manhattan incorrectly alleged in amended cross-claims (A. 94-98) that a demand by Manhattan for arbitration of the emergency generator problem and the Palco bedlight fixture problem had been refused by Providence. At trial, Manhattan's attorney stipulated that no such demand was ever made to Providence (R. 1682-83, App. 89a hereto) and the Fifth Circuit found that there was no evidence that any demand for arbitration was ever executed (Decision, Petition App. 26a, Fn. 38; see also R. 1836, App. 89a hereto). Under Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, such an allegation that Providence refused to arbitrate matters arbitrable under the contract, should have required the District Court to order arbitration to proceed under 9 U.S.C. §4, 388 U.S. 395, 400. Manhattan never alleged any arbitration demand with respect to the sewage ejection problem.

dence's rights under the contract,[7] therefore, with respect to the sewage ejection and Palco bedlight fixture problems were (1) to have the question of whether any delay was caused by Providence decided *by the architect;* (2) to have the benefit of the finality and conclusiveness of the initial decision of the architect if no timely appeal were taken to arbitration; and (3) not to be subjected to litigation unless and until the "prior condition" of submission of the matter to arbitrators had been satisfied.

C. The Fifth Circuit Ignored The Contractual Right To Have Questions Initially Decided By The Architect.

Decision of questions concerning requests for extensions of time *by the architect* is a contract right of Providence. The decision of the architect is first-step arbitration in a two-step arbitration procedure. See *Wilder v. Crook*, 250 Ala. 424 (1948).

This Court enforced a similar contractual provision that disputes should be decided by a government contracting officer or his representative, subject to

7 The above discussion concerns the arbitration issues. ¶ 31(c) of the Providence - Manhattan contract was construed by the District Court as a "no damage" clause, precluding Manhattan from claiming delay damages against Providence. Manhattan and Ernst suggest that the District Court made no such implicit finding; however, the finding is inherent in the granting of time extensions (and relief from liquidated damages) to Manhattan on account of delays caused by Providence (Conclusion 5, Petition App. 67a), but denying Manhattan's claims for damages from such delays. (Conclusion 13, Petition App. 68a). The conflict with Burgess Const. Co. v. M. Morrin & Son Co., Inc., 526 F.2d 108 (10th Cir. 1975), arises from the reversal by the Fifth Circuit of the District Court's denial of damages (implicitly based on ¶ 31(c)) without discussion and without Rule 52(a) F.R.Civ.P. deference.

appeal as provided by contract, in *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234; *United States v. Callahan Walker Const. Co.*, 317 U.S. 56, and *United States v. Blair*, 321 U.S. 730. As this Court has recognized, the decision of disputes by particular informed parties is one of the strong policies underlying arbitration. See *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 203:

> The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.

The resolution of such disputes by the architect, who is not only qualified by training and experience to make such determinations, but also familiar with the construction project from which the dispute arose, is consistent with the policy favoring arbitration. As the District Judge recognized, the District Judge had neither the experience nor the initial familiarity with the construction project to enable him to make such decisions (Finding 7, Petition App. 37a-38a).

The sewage ejection problem and the Palco bedlight fixtures problem each had been presented by Manhattan to the architect, as claims for extensions of time under Paragraph 31(c) of the General Conditions. The architect denied those extensions, and Providence is entitled under its contract for those decisions to be given effect. The District Court gave no deference to the architect's decisions, and reversed the architect's decisions on the sewage ejection and Palco bedlight

fixture problems although the architect's decision was, in effect, first-step arbitration subject to 9 U.S.C. §10. See *E. H. Marhoefer, Jr., Co. v. Mount Sinai, Inc.*, 190 F.Supp. 355, 360 (E.D. Wisc. 1961); *Wilder v. Crook*, 250 Ala. 424 (1948).

D. The Fifth Circuit Ignored The Contractual Right To Finality Of The Initial Decision If Not Promptly Appealed.

Providence, moreover, was entitled to the benefit of the finality and conclusiveness of the decisions denying requests for extensions of time concerning the sewage ejection problem and the Palco bedlight fixture problem, each of which had arisen more than a year prior to the bringing of this action. Timely arbitration would have allowed arbitrators to visit the project before the state of the work changed. The passage of time made it difficult (if not impossible) to duplicate the evidence which was presented to the architect or which could have been presented to arbitration, had arbitration been timely sought. When no arbitration was sought, the decision of the architect became final, and Providence was entitled not to be compelled after an unreasonable delay to relitigate disputes concerning the sewage ejection and Palco bedlight fixture problems. See *United States v. Blair*, 321 U.S. 730, 735, disapproving delay which allowed damages to accumulate.

E. The Fifth Circuit Ignored The Contract Provision That Second-Step Arbitration Is A Prerequisite To Litigation Of Contract Claims.

Providence also had the right to have any appeal from the initial decisions of the architect with respect to the sewage ejection and Palco bedlight fixture problems, presented to arbitrators rather than a judge. Reference to arbitrators with construction industry expertise, whose experience well suits them to make decisions in such matters, is an element of the policy favoring arbitration. When parties contractually agree, as Providence and Manhattan did, to whom appeals from the decision of the architect shall be presented, such a provision should be enforced. *United States v. Blair*, 321 U.S. 730. The "practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into," is a major consideration underlying the Federal Arbitration Act. S. Rep. No. 536, 68th Cong. 1st. Sess., 1924. (App. 99a, 105a hereto).

The "prior condition" provision of the Providence - Manhattan contract entitled Providence not to be subjected to litigation concerning the sewage ejection and Palco bedlight fixture problems unless and until arbitrators had decided the matter in accordance with the contract. Under Alabama law, such a provision is enforceable, *Sims v. City of Birmingham*, 254 Ala. 598, 610 (1950), and the same is true under federal law. *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234; see also *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424; and *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330 (5th Cir. 1970), in which "condition precedent" language, asserted as a defense, entitled the defendant to a stay.

Had the matter been submitted to arbitrators, the decision of the arbitrators might have differed from

that of the District Court, and the review of the arbitrators' decision should have been governed by the standards for enforcement of arbitration awards under 9 U.S.C. §10, rather than determined *de novo* as the District Court did. Compare *Crown Coat Front Co. v. United States*, 386 U.S. 503.

F. The Fifth Circuit Erroneously Held That Motions To Dismiss Did Not Adequately Raise Contractual Arbitration Rights.

The Federal Arbitration Act recognizes that a party may be in default, and not entitled to a stay pending arbitration; but it is inconsistent with the policy of the Federal Arbitration Act that default be lightly inferred.

Under the Federal Rules of Civil Procedure, Providence was entitled to whatever relief was proper, whether or not articulately pled; the motion to dismiss or to stay, whether or not the most appropriate vehicle, should have been procedurally sufficient to invoke Providence's rights under the contractual arbitration provisions. Providence thereafter moved to dismiss Manhattan's numerous amended cross-claims and set up the contractual arbitration provisions as defenses. See *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330 (5th Cir. 1970), granting a stay where arbitration was raised as a defense.

The conflict with the decision of the Sixth Circuit in *Germany v. River Terminal Ry. Co.*, 477 F.2d 546 (6th

Cir. 1973), which the Manhattan Brief and the Ernst Brief misconstrue, is that in *Germany*, arbitration was raised in the same fashion as in this case — "in a tendered amendment to a pleading in support of its position that the cross-claim of N & W *failed to state a claim upon which relief could be granted.*" (italics ours) 477 F.2d 546, 457. Providence offered the General Conditions as an attachment to the first Providence motion to dismiss Manhattan's cross-claim for failure to state a claim upon which relief could be granted; the arbitration provisions were specifically identified in the supporting brief (Petition App. 70a-72a). In *Germany*, such presentation in support of *dismissal* was sufficient to raise arbitration, and *did not* constitute default or waiver, although the party even sought to "abandon its request for arbitration" on appeal. 477 F.2d 546, 548.

A stay is not the sole remedy of a party sued in violation of a contractual commitment to arbitrate. In *Republic Steel Corp. v. Maddox*, 379 U.S. 650, reversing 275 Ala. 685 (1963), this Court reversed judgment for the plaintiff simply because the contractual prerequisite to suit, arbitration, had not been satisfied. In effect, this court in *Maddox* granted dismissal of the plaintiff's claim rather than a stay for belated arbitration. See also *Belk v. Allied Aviation Service Co. of New Jersey, Inc.*, 315 F.2d 513 (2d Cir. 1963), cert. denied 375 U.S. 847. If, as here, arbitration of the claims in question is barred by the failure of the aggrieved party (Manhattan) to timely appeal to arbitration, dismissal rather than stay is appropriate.

Providence did not demand arbitration of the sewage ejection and Palco bedlight fixture problems, because

the initial decisions had been in favor of Providence, such decisions had become final and conclusive by failure of Manhattan to timely demand arbitration (or to offer any excuse for delay), and Providence sought no relief from Manhattan other than to be relieved of Manhattan's litigation for the failure of Manhattan to satisfy its contractual obligations. See *Shanferoke C. & S. Corp. v. Westchester S. Corp.*, 293 U.S. 449, 453-54, adopting the reasoning of the Second Circuit below (70 F.2d 297 at 299) that a defendant "contented" with the decision of the plaintiff prior to suit not to proceed to arbitration, did not waive arbitration by failure to demand arbitration.

Manhattan cited several cases in which a party's delay in asserting its arbitration rights and conduct inconsistent with contractual arbitration provisions was held to constitute default which precluded a stay.[8]

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8 In Blake Construction Co. v. United States, 252 F.2d 658 (5th Cir. 1958), the defendant was in default by raising arbitration "for the first time as the actual trial got under way" 252 F.2d 658, 662.

In Cornell & Co. v. Barber & Ross Co., 242 F.Supp. 825, aff'd 360 F.2d 512 (D.C. Cir. 1966), the defendant moved for transfer of venue, answered, and counterclaimed without reference to arbitration before filing the motion to stay.

In La Nacional Platanera, S.C.L. v. North American F. & S.S. Corp., 84 F.2d 881 (5th Cir. 1936), a *plaintiff* was held in default by delaying more than three years after filing the complaint to move for a stay.

In Radiator Specialty Co. v. Cannon Mills, Inc., 97 F.2d 318 (4th Cir. 1938), a motion to stay was filed on the day agreed for trial, after an answer, a counterclaim, and several months of proceedings.

These cases are not inconsistent with the assertion of contract rights *other than to a stay*, because they each dealt with the untimeliness of a stay where the party did not raise arbitration in its initial pleading, and acted by litigating in a fashion inconsistent with the contractual arbitration provisions. Providence raised arbitration as a bar to the action in its initial response to Manhattan's claims, and asserted rights in addition to a stay.

Providence does not now seek any such untimely stay; Providence asserts contractual rights from the arbitration provisions other than for a stay.

G. The Fifth Circuit Erroneously Considered All Arbitration Rights To Be Waived For All Matters (Even Those Not Yet Raised) By Defense Of Any Claim.

1. *The Fifth Circuit held that litigation waived all contractual arbitration rights.*

The Fifth Circuit, in its initial decision, found that Providence's "pre- and post-suit behavior" waived arbitration.[9] The "pre-suit behavior" was the telephone

The *American Locomotive* cases (American Locomotive Co. v. Chemical Research Corp., 171 F.2d 115 (6th Cir. 1948), cert. denied 336 U.S. 909, [*American Locomotive I*] and American Locomotive Co. v. Gyro-Process Co., 185 F.2d 316 (6th Cir. 1950) [*American Locomotive II*], involved a dispute in which American Locomotive was sued for breach of a contract providing for arbitration; American Locomotive raised arbitration as a defense in *American Locomotive I*, and also filed a counterclaim, but did not move for a stay until almost eight years after the filing of the complaint. American Locomotive was held in default, and the stay denied. In *American Locomotive II*, American Locomotive sought an order referring the same dispute to arbitration under 9 U.S.C. §4, and this also was denied. The issue decided by the Sixth Circuit in the American Locomotive cases is simply whether stay (under 9 U.S.C. §3), or an order (under 9 U.S.C. §4), for arbitration, was proper; the question of defenses based on the contractual arbitration provisions was not considered, nor is it clear whether the contract gave American Locomotive the same rights as the Providence — Manhattan contract gives Providence.

9 The Manhattan Brief at pp. 4-5 refers to the holding of waiver in view of "*pre- and post-suit behavior*" (Manhattan's italics) but does not acknowledge that the Fifth Circuit withdrew on rehearing the suggestion that *pre-suit* behavior by Providence (the Kilborn telephone call) was pertinent to waiver. The Statement of Facts in

call from Providence's now deceased attorney, Vincent Kilborn, to an employee of the State Department of Public Health concerning the emergency generator problem, recorded in Ernst Ex. 268.[10]

The Fifth Circuit, on rehearing, retreated from its holding of "pre-suit" waiver by Providence but held that Providence's extensive litigation against Manhattan, and against parties other than Manhattan, was the "essence" of waiver (Opinion on Reh., Petition App. 31a-32a) apparently on the grounds that Providence's litigation against parties other than Manhattan is somehow pertinent to waiver of rights against Manhattan, and that Providence prejudiced Manhattan by defending Manhattan's claims.

2. *Litigation against non-parties to the arbitration agreement did not waive arbitration.*

The analysis of the Fifth Circuit is defective, in that Providence merely defended Manhattan's claims after

the Manhattan Brief is misleading in that it paraphrases Finding 126 of the District Court (Petition App. 65a) "In fact, Providence at one time, stated that if Manhattan should persist in its efforts to arbitrate, Providence would prevent same by filing a law suit." (Manhattan Brief, p. 3). As the Fifth Circuit recognized on rehearing (Opinion on Reh., Petition App. 31a-32a), that reference was to the Kilborn telephone conversation prior to the litigation, and was neither communicated to, nor relied upon, by any party. Manhattan's "efforts to arbitrate", if any, stopped short of ever demanding arbitration of *any* matter.

10 The Ernst Brief cites Ernst Ex. 268 and R. 2850-53 (App. 93a-96a hereto) in support of the misstatement at page 4 that Providence "boldly proclaimed" that Providence would oppose arbitration in court if "Ernst or any other party attempted to go to arbitration to resolve disputes which were pending and which became central issues in this suit . . ." The only party referred to in Ernst Ex. 268 was "the contractor", Manhattan, and the only issue was the emergency generator problem. The record citation given by Ernst (R. 2850-53, App. 93a-96a hereto) is to the reading of Ernst Ex. 268 into the record by Arthur Friedman, attorney for Ernst.

Providence's motion to dismiss or to stay was denied, and Providence asserted no claim against any party which could have been submitted to arbitration. The claims of Providence against Fairbanks, Ernst, or McCauley, were not subject to arbitration under the terms of the General Conditions of the Providence - Manhattan contract, because neither McCauley, Ernst, nor Fairbanks, was a party to the Providence - Manhattan contract.

Providence was not in default of any arbitration commitment with respect to McCauley, Ernst, or Fairbanks. The suggestion of the Ernst Brief that Ernst (or Manhattan) was somehow unfairly prejudiced by Providence's litigation against Ernst, is a red herring with respect to whether Providence waived contractual arbitration rights as to disputes that Providence had *with Manhattan.*

3. *Defense not inconsistent with arbitration after motion to dismiss or stay was denied, did not waive arbitration rights.*

Providence made no claim, cross-claim, or counterclaim against Manhattan which was inconsistent with Providence's contractual commitment to arbitrate, or which constituted default in seeking arbitration with respect to Manhattan, because Providence made no such claim against Manhattan at all. The only claim on behalf of Providence against Manhattan was framed by the District Court-*sua sponte* (Finding 11 I, Petition App. 41a). Such action of the District Court cannot be construed (as the Ernst Brief apparently

suggests it can) as a breach by Providence of the arbitration provisions of the Providence - Manhattan contract. Providence repeatedly moved to dismiss Manhattan's claims on several grounds, including the contractual arbitration provisions, and Providence *defended* Manhattan's claims *after* Providence's motions concerning arbitration were denied.

4. *The defense of the emergency generator claims did not waive arbitration rights with respect to claims first raised later.*

The sewage ejection problem arose early in the construction (November, 1968) and Manhattan requested an extension of time which was denied in May, 1969. For four years (from May, 1969, until first raised at trial in August, 1973), Manhattan never raised any claim concerning the sewage ejection problem either in arbitration or litigation.

The Fifth Circuit held that Providence, by defending Manhattan's other claims, likewise waived arbitration with respect to the sewage ejection problem. As to the sewage ejection problem, this confuses the sequence of events. Virtually all of Providence's "post-suit" litigation took place *prior* to Manhattan's sewage ejection claim, which was *first* raised on the fourteenth day of trial over Providence's objection (R. 2140-41, App. 92a-93a hereto). Providence's previous litigation in defense of Manhattan's other claims was not waiver or default of arbitration rights with respect to the unasserted sewage ejection claim, first raised at trial.

CONCLUSION

Manhattan and Ernst argue that the Fifth Circuit correctly held that the sole question concerning Providence's arbitration rights was whether Providence had waived its right to a stay under the Federal Arbitration Act by litigating without demanding arbitration.

Under Alabama law, Providence was entitled to dismissal of Manhattan's claims; but the Fifth Circuit held that Providence's sole right was to move for a stay under the Federal Arbitration Act, and that Providence's motions were insufficient to invoke that right.

The Fifth Circuit implicitly held that that Act preempted any contractual arbitration rights under state law, other than to seek a stay, and the Fifth Circuit held Providence waived its only federal contractual arbitration right, to a stay, by moving to dismiss Manhattan's cross-claims rather than by demanding a stay for untimely arbitration. The Fifth Circuit denied Providence the right to initial decision by the architect, the right to finality of the initial decision unless timely appealed, and the right not to be sued on any contract claim not previously decided by the arbitrators.

Providence did not want, at any time after Manhattan's cross-claims were raised, to go to arbitration on the emergency generator, sewage ejection, or Palco bedlight fixture problems;[11] Providence wanted to

11 The architect's representative during the trial (A. 442-45) decided a Manhattan claim concerning a different matter (the delay in releasing operating rooms) against Providence. Providence immediately moved for a stay (A. 400). The motion was summarily denied. (A. 401).

have Manhattan's claims against Providence dismissed, on the basis that the arbitration provisions of the Providence - Manhattan contract entitled Providence *not* to be subjected to suit.

After Providence's motions to dismiss were denied, Providence defended Manhattan's claims rather than demand belated arbitration. Manhattan and Ernst argue, and the Fifth Circuit held, that this defense "waived" all Providence's contractual arbitration rights. The issue for this Court is whether that interpretation of waiver, and the preemption of state law governing contractual arbitration rights, are correct.

Respectfully submitted,

Willis C. Darby, Jr.
Counsel for Petitioner
Post Office Box 2565
Mobile, Alabama 36601

PROOF OF SERVICE

I, Willis C. Darby, Jr., attorney for Providence Hospital, the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of February, 1978, I served copies of the foregoing Reply Brief of Providence Hospital to Briefs in Opposition to Petition for Certiorari on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

Attorneys for E. C. Ernst, Inc.

Glower W. Jones, Esquire
SMITH, CURRIE & HANCOCK
2600 Peachtree Center, Harris Tower
233 Peachtree Street, N. E.
Atlanta, Georgia 30303

Arthur S. Friedman, Esquire
FRIEDMAN & GASS
99 Park Avenue
New York, New York 10016

Attorney for Manhattan Construction Company of Texas

David M. Thornton, Esquire
111 Mid-Continent Building
Tulsa, Oklahoma 74103

Attorneys for Charles H. McCauley Associates, Inc.

Maurice Bishop, Esquire
BISHOP & CARLTON
327 Frank Nelson Building
Birmingham, Alabama 35203

Clarence V. McDorman, Esquire
LONDON, YANCEY, CLARK & ALLEN
2100 First National Southern
Natural Gas Building
Birmingham, Alabama 35203

Attorney for Fairbanks-Morse, Inc.

Louis E. Braswell, Esquire
Post Office Box 123
Mobile, Alabama 36601

Willis C. Darby, Jr.
Attorney for
Providence Hospital
Post Office Box 2565
Mobile, Alabama 36601

APPENDIX

UNITED STATES CODE
TITLE 9
ARBITRATION

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

July 30, 1947, c.392, 61 Stat. 672.

EXCERPTS FROM THE RECORD

[R. 1682]

* * *

MR. DARBY: I would like to object to that offer in as far as it would show that a demand was actually made and I would invite the stipulation from Mr. Thornton that Mr. Thornton never mailed the demand to the American Arbitration Association, that Manhattan never sent the man to

[R. 1683]

the American Arbitration Association. Can we have that stipulation, Mr. Thornton?

MR. THORNTON: I will stipulate that I didn't make the demand on the hospital.

* * *

[R. 1836]

MR. DARBY: Mr. Roberts, Mr. Thornton gave you a document that was entitled a Demand for the American Arbitration Association, did you submit that demand to the American Arbitration Association?

A I don't believe I did.

* * *

[R. 2134]

* * *

Q [By Mr. Thornton] Can you identify that document?

A [By Tom Roberts] It is a letter from myself to Charles H. McCauley and Associates attention, Mr. McCauley, dated May the 8th, 1969.

Q I would like to read that letter, Your Honor.

"Dear Mr. McCauley: We ask that you consider the delay involved due to the revision of the sewage ejection system as shown on drawings P-1, P-13 and P-14, dated 10-18-69, as the basis for extra

[2135]

compensation.

Last November, we were asked to submit a proposal for the revision of the sewer system in area "B", December 11, 1968, Sam T. Wallace submitted a breakdown to us that was in turn submitted to your office informally for examination. Later, Mr. Young of Evans and Young, reported that the breakdown was not correct based on his estimate of the proposed changes. The Sam P. Wallace proposal was resubmitted by Manhattan Construction Company February 21, 1969. We were notified March 25th, 1969, that this proposal was not accepted.

During this period (November 14, 1968 until March 25, 1969) the work scheduled for Build-

ing "B" was at a standstill, thus allowing the basement excavation to remain open one hundred and thirty-one calendar days.

We think the time delay can be absorbed since Building "B" is not as critical as Building "A" but that expenses incurred for pumping water from the excavation (an area approximately two hundred foot by fifty foot by ten feet deep) is justifiable as a claim for compensation.

We are fully aware that all of our expenses for this maintenance are not to be considered as,

[R. 2136]

in any case, we would have the basement excavation open for approximately thirty days. We are only asking that the owners share some portion of the expense incurred by the extended delay and ask that you give this problem your consideration and advise us of your opinion. Very truly yours, Manhattan Construction Company of Texas."

Now, Mr. Roberts, can you explain to the Court what the problem was with the sewage ejection system?

A Actually, the system is all right. It is installed as it was on the plans and specifications, someone, either in the architects or the owners office decided they wanted to make a change on it, we submitted, this indicates twice, but it was a continual submittal for several months back and forth trying to reach an amount of money that would be acceptable to the owner for the change. After we had actually delayed

that part of the work for a hundred thirty one days, they disapproved the change, not allowing for the change or the inconvenience.

* * *

[2140]

* * *

MR. DARBY: Your Honor, I object to this line of questioning until such time as Mr. Thornton has shown that he has some reason why Manhattan Construction Company did not use the machinery in the contract for bringing these issues up at the appropriate time.

Now, the contract provides that if he is dissatisfied with the decision of the arbitrator — not only the arbitrator, but of the architect, that he will take it to arbitration and it says within thirty days if at all practicable.

Now, if he wants to offer this evidence, I think

[R. 2141]

first he has to show it was without the arbitration provision of the contract, or, in the alternative, that he has a good reason for not having taken it within the thirty days. Had he done so, the arbitrator would have a construction expert that could have come up and looked at it. He is bringing it up at trial, although he has change order after change order that he has accepted. I think if he has an objection to one of them, he should have taken it up then, not now before Your Honor.

THE COURT: Overruled. Go ahead.

* * *

[R. 2850]

* * *

MR. FRIEDMAN: Now, the next exhibit is Ernst exhibit 263, which is a letter of March 30, 1970 from Manhattan to Braswell at McCauley. I don't propose to read any part of it.

Next, if Your Honor please, is Ernst exhibit 268 which I would like to read. It is a memorandum dated April 7, 1970 and it is from Author Joe Grant to Mr. Dean and the subject is Providence Hospital, Alabama 360.

> "Mr. Vince Kilborn, attorney of Mobile, representing Providence Hospital called this morning

[R. 2851]

> at ten thirty for the purpose of a personal chat regarding the generator at subject hospital. I told Mr. Kilborn that my position gave me no authority in this matter, though, I was aware of it and that Mr. Dean was the proper person to talk to."

If Your Honor please, I am reading this with the corrections made on the documents, the strike outs and handwritten notations.

> "He asked that we chat informally and he expressed concern regarding a letter from Mr.

Dean to the architect dated April 3, 1970. He stated that it imposed a responsibility on the architect (in the finding how specifications are not satisfied) that is not required under government contract law. I expressed a personal interest in his fact of the law but he did not elaborate rather he said that this was for someone elses lawyer to come up with.

He expressed concern that the state Department of Health if it did require this would put itself in a place of being a litigant which he did not wish to happen and he requested that the letter be withdrawn.

He pointed out that the architect turned down the Dorman engine in September of 1969. He further contends that by not requesting arbitration within the following six month period, the contractor waived

[R. 2852]

> his right for arbitration. He proposed that if they, at this point, requested arbitration, Providence Hospital would file a suit in Federal Court asking that arbitration be disallowed and that the contractor be required to furnish an engine meeting specifications.
>
> He would not discuss the matter regarding meeting specifications, although, he did mention that being foreign made could be a disqualifying factor even though other foreign made materials are possibly in the hospital.
>
> He also pointed out that the Providence

Hospital is also looking to the architect to protect them in the matter of not accepting a sub-standard generator. He pointed out that their information is that the Dorman engine has given trouble in a number of installations.

In response to my questions about the minutes from the contractor we received from a meeting held in Birmingham saying that the architect had accepted the generator. He noted that the notes were not admissable in Court.

In summary, Mr. Kilborn expressed the hope that the contractor will furnish a generator that will meet the specifications. At any rate, the next

step is up to the contractor. He, therefore, hopes that the State Health department will not intervene beyond its authority to ascertain if competitive bidding and prohibition against proprietary specifications are met."

And there is initials at the bottom A.J.G. and a date, April 6, 1970.

THE COURT: April 6.

MR. FRIEDMAN: Yes, Judge, the thing is dated April 7.

THE COURT: It says April 7.

MR. FRIEDMAN: The typewritten date on the first page is April 7.

THE COURT: All right. Go ahead.

H. R. Rep. No. 96, 68th Cong., 1st Sess. 1924

HOUSE OF REPRESENTATIVES

68th Congress } { Report
1st Session, } { No. 96.

TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION.

January 24, 1924. - Referred to the House Calendar and ordered to be printed.

MR. GRAHAM of Pennsylvania, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 646.]

The purpose of this bill is to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts. It was drafted by a committee of the American Bar Association and is sponsored by that association and by a large number of trade bodies whose representatives appeared before

the committee on the hearing. There was no opposition to the bill before the committee.

The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States. The remedy is founded also upon the Federal control over interstate commerce and over admiralty. The control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

The need for the law arises from an anachronism of our American laws, some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became

firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement. The procedure is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties. There is provided a method for the summary trial of any claim that no arbitration agreement ever was made, and there is also provided a hearing if the defeated party contends that the award was secured by fraud or other corruption or undue influence, or that some evident mistake not affecting the merits exists in the award. If the parties to the arbitration are willing to proceed under it, they need not resort to the courts at all. If one party is recalcitrant he can no longer escape his agreement, but his rights are amply protected. At the same time the party willing to perform his contract for arbitration is not subject to the delay and cost of litigation. Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court. The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form.

To secure jurisdiction for arbitration, however, service of process must be made personally, so that there

is no danger that a defendant, having an honest defense, will be called upon to defend his case at a distance under a disadvantage. The proceeding will be commenced practically as any action is now commenced in the Federal courts.

In view of the strong support of commercial and legal bodies, the entire lack of opposition before the committee, the obvious justice of the result sought to be attained, and the evident propriety and necessity of Federal action, we submit that the bill should become law. It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

S. Rep. No. 536, 68th Cong. 1st Sess., 1924

CALENDAR NO. 569

68th Congress, 1st Session } SENATE { Report No. 536

TO MAKE VALID AND ENFORCEABLE CERTAIN AGREEMENTS FOR ARBITRATION

May 14, 1924. — Ordered to be printed

MR. STERLING, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1005]

The Committee on the Judiciary, to whom was referred the bill (S. 1005) to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations, report the same back with certain amendments thereto and, as so amended, the committee recommend that the bill do pass.

The amendments are as follows:

In lines 6 and 7, page 1 of the bill, strike out the words "or interstate."

In line 6, section 2, page 2, strike out the words "contract or"; and in line 7, section 2, page 2, after the word "or" insert the words "a contract evidencing a"; and in line 9, on said page, strike out the words "between the parties."

In line 18, section 4, page 3, after the word "agreement" as it first occurs in said line, insert the following proviso:

> Provided, That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed.

On page 6, strike out section 8 of the bill.

Beginning with the word "That," in line 21 section 10, page 6, strike out all down to and including the word "attorneys" in line 25.

On page 10, strike out section 14 of the bill.

On page 11, strike out section 16 of the bill.

Beginning with section 9, renumber the sections following, as required by the striking out of certain designated sections.

* 5-17-24

The purpose of the bill is clearly set forth in section 2, which, as proposed to be amended, reads as follows:

> Sec. 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The "maritime transactions or contracts," to which the bill will apply, are defined in section 1. Likewise,

the definition of "commerce" in the same section, shows to what contracts in interstate or foreign commerce the bill will be applicable.

It is not contended that agreements to arbitrate have no validity whatever. A party may be liable in an action for damages for the breach of an executory agreement to arbitrate; or, if the agreement has been executed according to its terms and an award made, the appropriate action may be brought at law or in equity to enforce the award. Both maritime contracts or transactions and contracts involving interstate commerce are at least valid to this extent.

But it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such an agreement be ground for a stay of proceedings until arbitration was had. Further, the agreement was subject to revocation by either of the parties at any time before the award. With this as the state of the law, such agreements were in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy.

Until recently in England, and up to the present time in nearly, if not quite all, the States of the Union, such has been the law in regard to arbitration agreements. The Federal courts have in the main been governed by the same rules and, as a consequence, have denied relief to the parties seeking to compel the performance

of executory agreements to settle and determine disputes by arbitration. If the agreement to arbitrate is found in a maritime contract or transaction, no action in admiralty for specific performance will lie, for the simple reason that this court is without power to grant equitable relief.

Various reasons have been given for these ancient rules of English law, followed as they have been by our State and Federal courts. Among these reasons were, first, the expressed fear on the part of the courts that arbitration tribunals did not possess the means to give full or proper redress, and also the doubt they entertained as to their right to compel an unwilling party to submit his cause to such a tribunal, thus denying to him the right to submit the same to the ordinary courts of justice for hearing and determination. Second, the jealousy of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction. To what extent the second reason influenced the first may be difficult to say; but it is not unreasonable to suppose that a desire to retain, if not extend, their jurisdiction had much to do with inspiring the fear that arbitration tribunals could not do justice between the parties. And third, established precedent has had its large part of course in perpetuating the old rules long after the courts themselves could no longer see that they were founded in reason or justice.

It has been said that "arrangements for avoiding the delay and expense of litigation and referring a dispute to friends or neutral persons are a natural practice of which traces may be found in any state of society." The

desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals. The Arbitration Society of America, with offices in the city of New York, has, through its arbitration tribunal, settled more than 500 cases during its less than two years of existence. In the New York Times of May 11 is found a brief resume of the work accomplished. We quote the following:

> In contrast with the long time required by the courts with their congested calendars to settle a dispute, the records of the society show that the average arbitration required but a single hearing, and occupied but a few hours of the time of disputants, counsel, and witnesses. The cost to the disputants was said to be trifling as compared with the cost of litigation.
>
> Complicated controversies involving large sums of money, which, beyond a reasonable doubt, if taken to the courts would have been fought through years of costly litigation, have been legally determined in this tribunal whose only rule of procedure is the rule of common sense, in from two to three weeks, the report states, "and the specially significant thing — just as significant as the saving of time and money — is the fact that wide satisfaction has resulted from the procedure. Winners and losers alike bear

witness to this in letters on file at the office of the society."

The record made under the supervision of this society shows not only the great value of voluntary arbitrations but the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into.

The bill, while relating to maritime transactions and to contracts in interstate and foreign commerce, follows the lines of the New York arbitration law enacted in 1920, amended in 1921, and sustained by the decision of the Supreme Court of the United States in the matter of the Red Cross Line v. Atlantic Fruit Co., rendered February 18, 1924.

Reference has been made herein to the definitions contained in the first section of the bill. The second section is set forth in full.

Section 3 provides for a stay of proceedings and arbitration in any suit where it appears that the issue involved is referable to arbitration under the contract.

Section 4 provides a simple method for securing the performance of an arbitration agreement. The aggrieved party may apply to the proper district court on five days notice, and the court will order the party to proceed. The constitutional right to a jury trial is adequately safeguarded.

Section 5 provides for the manner of naming the arbitrators in case the parties have failed to name them.

Section 6 provides for expedition in the matter of the hearing of arbitration matters by the court.

Section 7 gives the arbitrators power to summon witnesses.

Section 9 protects libels and seizures of vessels in admiralty proceedings.

Section 10 provides for the entry of a judgment where the parties have agreed thereto and for determining the appropriate court.

Section 11 provides that an award may be vacated where it was procured by corruption, fraud, or undue means, or where there was partiality or corruption on the part of the arbitrators, or where they have been guilty of misconduct or have refused to hear evidence pertinent and material to the controversy, or have been guilty of any other misbehavior prejudicial to the rights of either party, or where they have exceeded their powers.

Section 12 gives power to the court to modify or correct the award where there was evident material miscalculation of figures, or evident material mistake in the description of any person, thing, or property, or where the arbitrators have made an award upon a matter not submitted to them, or where the award is imperfect in matter of form.